Supreme Court, U.S.
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No. 95-464

In The

Supreme Court of the United States

October Term, 1995

—♦—

LOUIS ANTHONY MANNA,

Petitioner,

-against-

UNITED STATES DEPARTMENT OF JUSTICE; UNITED STATES ATTORNEY FOR THE DISTRICT OF NEW JERSEY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether the Government is permitted to withhold records pursuant to 5 U.S.C. §552(b)(7)(A) when the statute of limitations has expired with regards to all offenses and the Government alleges the records could reasonably be expected to interfere with enforcement proceedings in the future.

2. Whether the Government is permitted to withhold records pursuant to 5 U.S.C. §552(b)(7)(C) by taking into consideration the identity of the requester and the purpose of the request.

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UNITED STATES DEPARTMENT OF JUSTICE; UNITED STATES ATTORNEY FOR THE DISTRICT OF NEW JERSEY,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Louis Anthony Manna, pro se, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-31a) is reported at 51 F.3d 1158 (3d Cir. 1995). One district court opinion (App. 32a-85a) is reported at 815 F. Supp. 798 (D.N.J. 1993), and the final opinion and order is unreported (App. 88a-116a).

JURISDICTION

The Judgment of the court of appeals was entered on April 5, 1995. A petition for rehearing was denied on June 6, 1995 (App. 86a-87a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The freedom of Information Act (FOIA), 5 U.S.C. § 552, provides in pertinent part:

(b) This section does not apply to matters that are--

* * * * * * * *

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, * * * (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, * * * *

STATEMENT OF THE CASE

Petitioner was convicted in the United States District Court for the District of New Jersey and sentenced to a term of eighty (80) years confinement. *United States v. Manna*, crim. no. 88-239 (D.N.J. Oct. 12, 1989), *aff'd without opinion*, 919 F.2d 733 (3d Cir. 1990) (table), *cert. denied*, 499 U.S. 949 (1991).

Petitioner filed a Freedom of Information Act ("FOIA") request in May 1991 pursuant to 5 U.S.C. § 552 with the United States Attorney for the District of New Jersey seeking disclosure of all records referring to himself in an effort to prove his innocence as well as Government misconduct during the criminal prosecution which resulted in Petitioner's conviction and confinement.

The Government released some records, but asserted that most records were exempt from disclosure under various FOIA exemptions. After exhausting all administrative remedies, Petitioner filed suit in the district court seeking declaratory and injuctive relief to compel disclosure of all records in the Government's possession referring to himself. The district court granted summary judgment in favor of the Government. (App. 32a-85a.) With respect to Exemption 7(A) (interference with law enforcement proceedings), the district court concluded that the Government had "submitted sufficient evidence that these documents are instrumental to proceedings anticipated in the near future" and, thus, are exempt as they could reasonably be expected to interfere with law enforcement proceedings. *Manna*, 815 F. Supp. at 808. The court of appeals agreed. *Manna*, 51 F.3d at 1164.

As to the documents relating to Exemption 7(C) (personal privacy), the district court determined that the privacy interest of the interviewers, informants, witnesses, victims and law enforcement personnel outweighed any public interest asserted by the petitioner. *Id.* at 809. The court, in fact, concluded that Petitioner never showed "any public interest" in the information, let alone a public interest that would outweigh the demonstrated privacy interests. *Id.* The court of appeals agreed. *Manna*, 51 F.3d at 1166.

The Third Circuit held "Although a court does not usually take a requester's identity into consideration, Manna's position....is highly material to the protection of individual privacy interests that Exemption 7(C) is meant to protect." *Manna*, 51 F.3d at 1166.

Petitioner appealed to the United States Court of Appeals for the Third Circuit, and that court affirmed with one judge dissenting.

REASONS FOR GRANTING THE WRIT

I

To Correct The Government's View That is Permitted to Withhold Records Pursuant to 5 U.S.C. § 552 (b) (7) (A) When The Statute of Limitations Has Expired With Regards to all Offenses and the Government Alleges The Records Could Reasonably Be Expected to Interfere With Enforcement Proceedings in The Future

The District court permitted the Government to withhold numerous records pursuant Exemption 7(A). *Manna,* 51 F.3d at 1164. This exemption authorizes the withholding of "records or information complied for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could be reasonably expected to interfere with enforcement proceedings." *Id.* To fit within Exemption 7(A), the Government must show that (1) a law enforcement proceeding is pending or prospective and (2) release of the information could reasonably be expected to cause some articulable harm. *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978). The Court of Appeals held" [u]nder this exemption, a court may also take into consideration the requester's identity. *See Robbins Tire & Rubber*, 437 U.S. at 239-40; *Grasso v. IRS*, 785 F. 2d 70, 76-77 (3d Cir. 1986). In *Grasso*, we explained:

> The usual rationale[s] given for [applying Exemption 7(A)] is the danger of witness intimidation, the witness' desire to maintain confidentiality, and concern that premature disclosure would create a chilling effect on potential witnesses and dry up sources of information. *Id.*

at 76 (citing *J.P. Stevens & Co., Inc. v. Perry*, 710 F.2d 136, 143 (4th Cir. 1983))." *Manna*, 51 F.3d at 1164.

Pursuant to Exemption 7(A), an agency must show that the records were compiled for law enforcement purposes and that disclosure (1) could reasonably be expected to interfere with (2) enforcement proceedings that are (3) pending or *reasonably anticipated*. As to the first two of these requirements, the statutory language speaks for itself. *Cf. Robbins Tire & Rubber Co.*, 437 U.S. at 224-25 (purpose of exemption is to "prevent '[harm] to the Government's case in the court' by not allowing litigants 'early or greater access' to agency investigatory files than they would otherwise have" (citations omitted)). As to the last requirement, the District of Columbia Circuit held "that the exemption is available where enforcement proceedings are 'pending or contemplated.' " *Mapother v. Department of Justice*, 3 F.3d 1533, 1540 (D.C. Cir. 1993) (quoting *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854 870 (D.C. Cir. 1990)). The word "Contemplated," as used in *Coastal States*, speaks to the enforcing agency's intentions.

Judge Becker stated, "Since Manna has been imprisoned for over five years, the government cannot be contemplating a RICO or obstruction of justice claim against him unless with respect to the RICO claim the government can show that Manna has committed a predicate act while in prison. * * * Manna argues that there is no evidence in the record to establish this fact even though the agency had access to his visitation records, his mail, and his recorded telephone conversations. * * * The government, of course, has the

burden of showing that a FOIA exemption applied. However, the government's submissions are conclusory, lacking in both time frames and any details as to either criminal involvement by Manna or contact by him with LCN associates." *Manna*, 51 F.3d at 1168 n. 1 (Becker, J., dissenting).

Judge Becker stated in his dissent, "I think it is insufficient that the agency may at some unspecified future point in time bring an enforcement "Manna, 51 F.3d at 1168. the Government has not indicated that any such proceedings are in the works, but expects that they may be prosecuted "within the space of this decade." *Id.* The Government must demonstrate that the release of records would impede a prospective law enforcement proceeding that is viable, and that it is impossible to redact the exempted information and release the other information.

1. The Third Circuit's decision conflicts with this Court's decision, *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) ("The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.").

2. The Third Circuit's decision conflicts with the District of Columbia Circuit, *Mapother v. Department of Justice*, 3 F.3d 1533, 1540 (D.C. Cir. 1993) ("[W]e conclude that to withhold documents pursuant to Exemption 7(A), an agency must show that they were compiled for law enforcement purposes and that their disclosure (1) could reasonably be expected to interfere

with (2) enforcement proceeding that are (3) pending or reasonably anticipated.").

3. The Third Circuit's erroneous interpretation of Exemption 7(A) is sufficiently important to warrant correction by this court.

II

To Correct The Government's View That it Permitted to Withhold Records Pursuant to 5 U.S.C. § 552 (b) (7) (C) By Taking Into Consideration The Identity of The Requester and The Purpose of The Request

The district court allowed the Government to withhold numerous records pursuant Exemption 7(C). *Manna*, 51 F.3d at 1165. This exemption authorizes the withholding of records or information compiled for law enforcement purposes to the extent that production of such records "could reasonably be expected to constitute an unwarranted invasion of personal privacy." *Id* Exemption 7(C) also requires a balancing of the privacy interests at risk against the public interests, if any, that would be served by disclosure.

Petitioner repeatedly asserted in the district court that he was seeking records with the names of agents, informants, interviewees, etc. redacted. This constitutes a far lower threat of invasion of privacy. There is a public interest in the release of the records, in that one of the reasons the records were sought was to ascertain whether the Government withheld *Brady* material at Petitioner's trial. The Third Circuit had previously stated the "public at large has an important stake in ensuring that criminal justice is fairly administered; to the extent disclosure may remedy and deter *Brady* violations, society stands to gain." *Ferri v. Bell*, 645 F.2d 1213, 1218 (3d Cir. 1981) (prisoner sought information to overturn a conviction) ("Although the motivation behind Ferri's request is....personal, a FOIA request for material implicating the *Brady* rule simultaneously advances an 'indirect public

purpose' satisfying the second prong of the test for disclosure under one of the privacy-based exemptions."), *modified*, 671 F.2d 769, 771 (3d Cir. 1982) (per curium) ("[T]he purpose of the remand is simply to determine whether *Brady* claim exists that is sufficiently colorable so that the public interest in fair administration of justice warrants disclosure despite Exemption 7(c)."). *Manna*, 51 F.3d at 1169.

As a rule, the public's interest in exposing Government corruption and wrongdoing is the primary rationale for FOIA. *See e.g., NLRB v. Robbins Tire & Co.*, 437 U.S. 214, 242 (1978) ("The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."). Judge Becker stated, "I think that Manna may have a viable legal theory as to the facts. He avers that on December 21, 1986, 'the New York Telephone Company removed a 189b Tek Com 88MH Load Com from my telephone line.' First Manna Decl. ¶ 8 (A 102); Second Manna Decl. ¶ 5 (A 334). the agency responds with evidence that on January 20, 1987, the district court ordered a pen register attached to Manna's lines. Sealed Hanna Decl. ¶ 6 (SA 3-4). Given the discrepancy in the dates, it seems to me the district should not have concluded in the agency's motion for summary judgment that no public interest was implicated by Manna's request." *Manna*, 51 F.3d at 1163-70 n.3.

The court of appeals affirmed the district court wherein it stated "Although the general rule is that neither the purpose for which the request is made nor the identity of the requester can determine whether

documents should be disclosed, the facts in this case necessitate a departure from this general rule. I cannot overlook the fact plaintiff has been sentenced to 80 years in prison for murder and his participation in organized crime as a leader within one of the most powerful organized LCN families in the nation." *Manna*, 51 F.32d 1166 (quoting *Manna*, 815 F. Supp. at 809). The Third Circuit went on to state "we are in accord with the district court's findings. Although a court does not usually take a requester's identity into consideration, Manna's position in the hierarchy of a particularly influential and violent La Cosa Nostra family is highly material to the protection of individual privacy interests that Exemption 7(C) is meant to protect." *Id.*

The FOIA requires that non-exempt information be released to "any person" (5 U.S.C. § 552 (a) (3)), and the Supreme Court has long recognized that courts cannot distinguish among requesters. See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *Robbins Tire & Rubber Co.* 437 U.S. at 221. The District of Columbia Circuit has stated, "Congress granted the scholar and the scoundrel equal rights of access to agency records." *Durns v. Bureau of Prisons*, 804 F.2d 701, 706 (D.C. Cir. 1986), *vacated on other grounds*, 486 U.S. 1029 (1988).

1. The Third Circuit's decision conflicts with this Court's decision, *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 771 (1989) ("[W]hether an invasion of privacy is *warranted* cannot turn on the purpose for which the request for information is made," and that "the identity of

the requesting party has no bearing on the merits of his or her FOIA request.") (Emphasis in original).

2. The Third Circuit's decision conflicts with the District of Columbia Circuit decision, *Durns v. Bureau of Prisons*, 804 F.3d 701, 706 (D.C. Cir. 1986), *vacated on other grounds*, 486 U.S. 1029 (1988) ("Congress granted the scholar and the scoundrel equal rights of access to agency records.").

3. The Third Circuit's erroneous interpretation of Exemption 7(C) is sufficiently important to warrant correction by this Court.

CONCLUSION

For the foregoing reasons, petition respectfully submits that the petition for a writ of certiorari should be granted.

Dated: Springfield, Missouri
August, 1995

Respectfully submitted,

LOUIS ANTHONY MANNA

No. _____

In The

Supreme Court of the United States

October Term, 1995

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LOUIS ANTHONY MANNA,

Petitioner,

-against-

UNITED STATES DEPARTMENT OF JUSTICE; UNITED STATES ATTORNEY FOR THE DISTRICT OF NEW JERSEY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

APPENDIX

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Appendix A - Opinion of the United States Court of Appeals for the Third Circuit, Decided April 5, 1995 [Pages 1a - 31a]

Louis Anthony MANNA,

Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE; United States Attorney - District of New Jersey,

Appellees.

No. 93-5662.

United States Court of Appeals,
Third Circuit.

Submitted Under Third Circuit LAR 34.1(a)
June 22, 1994

Decided April 5, 1995.

Louis Anthony Manna, Leavenworth, KS, pro se

Michael Chertoff, U.S. Atty., Robert M. Hanna, Asst. U.S. Atty., Newark, NJ, for appellees.

Before: BECKER and HUTCHINSON, Circuit Judges, and JOYNER, District Judge.*

OPINION OF THE COURT

HUTCHINSON, Circuit Judge.

Pro se appellant, Louis Anthony Manna ("Manna"), appeals from a final judgment of the

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* Hon. J. Curtis Joyner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

United States District Court for the District of New Jersey granting summary judgment in favor of appellees, the United States Department of Justice and the United States Attorney's Office-District of New Jersey (collectively "Government"). Manna, relying on the Freedom of Information Act ("FOIA"), 5 U.S.C.A. §552 (West 1977 & Supp.1994), seeks disclosure of all government documents referring to him, apparently in an effort to prove both his "innocence" and government misconduct during the criminal prosecution that resulted in his incarceration. Although it turned over some documents, the Government asserted that others were exempt from disclosure under various FOIA exemptions. The district court agreed and, in two separate opinions, granted the Government summary judgment. *Manna v. United States Dep't of Justice,* 815 F.Supp. 798 (D.N.J.1993); *Manna v. United States Dep't of Justice,* No. 92-1840 (D.N.J. August 25, 1993). Manna appeals the district court's decision with respect to those documents the Government claimed were exempted under sections 7(A), 7(C) and 7(D). 5 U.S.C.A. §§ 552(b)(7)(A), (C), (D). We affirm.

I. *Factual and Procedural History*

Manna, presently confined in the United States Penitentiary at Leavenworth, Kansas, served for over eight years as "consigliere" under Vincent "Chin" Gigante in the powerful New Jersey faction of the "Genovese Crime Family" of "La Cosa Nostra" ("LCN"). The district court succinctly summarized

the ruthless "business" activities the Genovese Crime Family routinely engages in, stating:

> In the Northern New Jersey-New York Metropolitan area, the Genovese LCN Family has historically been one of the most powerful of the American Mafia criminal organizations. Today, the New Jersey contingent of the Genovese Family, through an entrenched network of racketeering operations, preys upon the transportation, shipping and construction industries. The Genovese LCN Family uses violence, intimidation and obstruction to further its organized criminal activities.

Manna, 815 F.Supp. at 802.

In 1989, a jury found Manna guilty, among other things, of RICO[1] offenses involving predicate violations of the Hobbs Act (extortion) and Taft-Hartley Act (bribery), organized gambling and three separate murder predicates relating to the affairs of the Genovese Crime Family. The convictions for conspiracy to murder in aid of racketeering involved the planned murders of John and Gene Gotti, high-ranking members of the "Gambino Family," and the notorious murder of Irwin Schiff in August 1987. The district court sentenced Manna, then aged sixty, to eighty years imprisonment. We affirmed Manna's

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[1] Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C.A. §1961 *et seq.* (West Supp. 1994).

conviction without opinion in *United States v. Manna*, 919 F.2d 733 (3d Cir. 1990) (table), *cert. denied*, 499 U.S. 949, 111 S.Ct. 1418, 113 L.Ed.2d 471 (1991).

In May 1991, Manna filed a FOIA request generally seeking "all records in reference to [him]self" and specifically "all records in regards to any electronic surveillance, whether legal or illegal" in the Government's possession. Manna desired to prove not only "government misconduct and wrongdoing" during his criminal trial, but also his "innocence."

On or about October 25, 1991, the Executive Office for United States Attorneys ("EOUSA") (the Justice Department division charged with processing FOIA requests sent to United States Attorneys' offices) turned over certain records to Manna. EOUSA refused to turn over other documents, relying upon various FOIA exemptions. On March 25, 1992, the Office of Information and Privacy affirmed EOUSA's decision. EOUSA provided additional documents on June 10 and September 30, 1992, but again refused to turn over others, claiming each fell within a FOIA exemption. The records provided were mainly pre-trial and trial transcripts.

On May 1, 1992, after exhausting his administrative remedies, Manna filed suit in the district court seeking declaratory and injunctive relief to compel disclosure of all documents in the

Government's possession referring to him. On October 2, 1992, the Government moved for summary judgment. In support of its motion the Government filed: (1) the declarations of Robert C. Stewart, an Assistant United States Attorney for the District of New Jersey and Chief of the Strike Force Division; (2) the declarations of Virginia L. Wright, a supervisory paralegal specialist with EOUSA; (3) the declarations of Evelyn F. Bock, a paralegal specialist employed by the United States Attorney's Office for the District of New Jersey; (4) the declaration of Robert M. Hanna, an Assistant United States Attorney for the District of New Jersey; (5) the declaration of Marcus Williams, an Attorney-Advisor in the Employment Law and Information Branch of the Office of General Counsel for the Federal Bureau of Prisons; (6) the declaration and supplement thereto of Michael D. Turner, a Special Agent assigned to the Freedom of Information Management Division at the Federal Bureau of Investigation ("FBI") in Washington, D.C.; and (7) two other declarations under seal.[2] Manna also submitted his own declaration in opposition to the Government's summary judgment motion and in support of his cross-motion for the same.

The district court, in a March 4, 1993, published opinion and an August 25, 1993, letter

[2] On February 15, 1994, we granted the Government's motion to supplement the appendix with the two declarations filed under seal.

opinion, granted the Government's motion for summary judgment. *Manna v. United States Dep't of Justice*, 815 F. Supp. 798 (D.N.J.1993); *Manna v. United States Dep't of Justice*, No. 92-1840 (D.N.J.August 25, 1993). With respect to Exemption 7(A) (interference with law enforcement proceedings) the district court concluded that the Government had "submitted sufficient evidence that these documents are instrumental to proceedings anticipated in the near future" and, thus, are exempt as they could reasonably be expected to interfere with law enforcement proceedings.[3] *Manna*, 815 F.Supp. at 808.

As to the documents relating to Exemption 7(C) (personal privacy) the district court determined that the privacy interest of the interviewees, informants, witnesses, victims and law enforcement personnel outweighed any public interest asserted by Manna. *Id.* at 809. The court, in fact, concluded that Manna never showed "any public interest" in the information, let alone a public interest that would outweigh the demonstrated privacy interests. *Id.*

With regard to documents the Government claimed fell within Exemption 7(D) (confidential law enforcement sources) the district court determined that the Government had met its burden, reasoning

[3] Without violating the sealing order, we think that the dissent fails fully to appreciate the specificity of parts of the two sealed declarations.

that "sources were given numbers to protect their identities and were expressly assured that their identities and the information they provided would be held in confidence by the FBI."[4] *Manna*, No. 92-1840, slip op. at 17.

II. *Jurisdiction and Standard of Review*

The district court had subject matter jurisdiction under FOIA, 5 U.S.C.A. § 552(a)(4)(B) and 28 U.S.C.A. § 1331 (West 1993). We have

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[4] The district court also held that other documents were exempt form disclosure under (1) Exemption 7(F) (endangerment of life or physical safety of law enforcement personnel), 5 U.S.C.A. § 552(b)(7)(F); (2) Exemption 6 (personal privacy), 5 U.S.C.A. § 552(b)(6); (3) Exemption 3 (statutorily exempt records, e.g., grand jury materials, Title III intercept materials and pen register Materials), 5 U.S.C.A. § 552(b)(3); and (4) Exemption 5 (common law privileges, *e.g.*, attorney-client privilege, attorney work product and deliberative process privilege), 5 U.S.C.A. § 552(b)(5). *Manna*, 815 F.Supp. at 810-16; *Manna*, No. 92-1840, slip op. at 4-11, 18. The district court also held that the Government's search for records responsive to Manna's FOIA request was adequate. *Manna* 815 F.Supp. at 816-17. Further, the district court determined that the Government's submissions provided a sufficiently detailed basis for summary judgment and therefore were the functional equivalent of a *Vaughn* index. *Id.* at 817-18. *See Vaughn v. Rosen*, 484 F.2d 820 (D.C.Cir.1973), *cert. denied*, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed2d 873 (1974). Manna does not discuss these rulings in his brief on this appeal and accordingly any issues concerning them are waived. Rather, he focuses his arguments on Exemptions 7(A), (C) and (D), which we consider hereafter on their merits. With respect to Exemption 6, *see also infra* note 8.

appellate jurisdiction under 28 U.S.C.A. § 1291 (West 1993).

[1-4] In reviewing a grant of summary judgment in proceedings seeking disclosure under. FOIA, we must first determine whether the district court had an adequate factual basis for its determination. *McDonnell v. United States*, 4 F.3d 1227, 1242 (3d 1993); *Patterson v. FBI*, 893 F.2d 595, 600 (3d cir.), *cert. denied*, 498 U.S. 812, 111 S.Ct. 48, 112 L.Ed.2d 24 (1990). To put the point differently, the appellate court

> is to determine, from inspection of the agency affidavits submitted, whether the agency's explanation was full and specific enough to afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding.

McDonnell, 4 F.3d at 1242 (quoting *King v. Dep't of Justice*, 830 F.2d 210, 217-18 (D.C.Cir.1987)). If this Court concludes that the evidence presented a sufficient factual basis, we must then decide whether the district court's determinations were clearly erroneous. *Id.* Under the clearly erroneous standard, we "may reverse only if the findings are unsupported by substantial evidence, lack adequate evidentiary support in the record, are against the clear weight of the evidence or where the district court has misapprehended the weight of

the evidence.' " *Id.* (quoting *Lame v. Dep't of Justice*, 767 F.2d 66, 70 (3d Cir.1985) ("*Lame II*")). Of course, questions of law receive plenary review. *Id.*

III. *FOIA*

A. *Overview*

[5] Congress enacted FOIA "to facilitate public access to Government documents." *United States Dep't of State v. Ray*, 502 U.S. 164, 173-74, 112 S.Ct. 541, 547, 116 L.Ed.2d 526 (1991). Without question, FOIA "reflects[s] 'a general philosophy of full agency disclosure[,]' " *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152, 110 S.Ct. 471, 475, 107 L.Ed.2d 462 (1989) (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 360-61, 96 S.St. 1592, 1598-99, 48 L.Ed.2d 11 (1976)), to " 'ensure an informed citizenry, vital to the functioning of a democratic society.' " *FBI v. Abramson*, 456 U.S. 615, 621, 102 S. Ct. 2054, 2059, 72 L.Ed.2d 376 (1982) (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978)). To this end, FOIA requires governmental agencies to make promptly available any records requested so long as the request " 'reasonably describes such records." ' *Landano v. United States Dep't of Justice*, 956 F.2d 422, 425 (3d Cir.) (quoting 5 U.S.C. § 552(a)(3)), cert. denied, _____ U.S. _____, 113 S.Ct. 197, 121 L.Ed.2d 139 (1992, vacated in part on other grounds, __U.S.__, 113 S.Ct. 2014, 124 L.Ed.2d 84 (1993).

There are, however, specific exemptions from disclosure set forth in FOIA itself. In-deed, "[d]espite these pronouncements of liberal congressional purpose," the Supreme Court teaches us that "the statutory exemptions are intended to have meaningful reach and application" and should not "be construed in a nonfunctional way." *John Doe Agency,* 493 U.S. at 152, 157, 110 S.Ct. at 475, 477-78. The Supreme Court reasoned:

> "Congress realized that legitimate governmental and private interests could be harmed by release of certain types of information," and therefore provided the "specific exemptions under which disclosure could be refused." Recognizing past abuses, Congress sought "to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy."

Id. at 152, 110 S.Ct. at 475 (quoting *Abramson,* 456 U.S. at 621, 102 S. Ct. at 2059) (other quotation and citation omitted).

[6,7] Because FOIA creates a presumption favoring disclosure, the agency has the burden of showing that a statutory exemption applies. *McDonnell,* 4 F.3d at 1241. "The agency may meet this burden by filing affidavits describing the

material withheld and detailing why its fits within the claimed exemption." *Id.* (citing *King*, 830 F.2d at 210). In *McDonnell*, we emphasized the purpose served by the affidavits and stated:

> The significance of agency affidavits in a FOIA case cannot be underestimated. As, ordinarily, the agency alone possesses knowledge of the precise content of documents withheld, the FOIA requester and the court both must rely upon its representations for an understanding of the material sought to be protected.

Id. To facilitate review of the agency's actions, the government must submit detailed affidavits indicating why each withheld document falls within an exempt FOIA category and, if public disclosure of the information needed to reach the decision would frustrate the exemption, the government should submit sealed affidavits. *See, e.g., Patterson*, 893 F.2d at 599; *American Friends Serv. Comm. v. Dep't of Defense*, 831 F.2d 441, 444 (3d Cir.1987) ("[A]n agency is entitled to summary judgment if its affidavits describe the withheld information and the justification for withholding with reasonable specificity, demonstrating a logical connection between the information and the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.") (internal quotations and citation omitted).

B. *Exemption 7*

[8] Exemption 7 generally applies to "records or information compiled for law enforcement purposes." 5 U.S.C.A. § 552(b)(7). in *John Doe Agency*, the Supreme Court interpreted this language broadly to mean that the agency does not have to compile the documents *initially* for law enforcement purposes, so long as they are compiled for that purpose as the time the request for them is made. *John Doe Agency*, 493 U.S. at 155, 110 S.Ct. at 476-77. Thus, even if the government initially compiles the records for non-law-enforcement purposes after a request is made, but later transfers the documents to a law enforcement agency seeking to use them for law enforcement purposes, the documents satisfy this threshold requirement. *See id.* at 159-60, 110 S.Ct. at 478-79 (Stevens, J. dissenting). After establishing the threshold requirement, the government must still show that the record or information withheld falls within one of the six enumerated subsections of Exemption 7. *See id.* at 156, 110 S.Ct. at 477.

1. *Exemption 7(A)*

[9] the district court permitted the Government to withhold numerous records under Exemption 7(A). 5 U.S.C.A. § 552(b)(7)(A). This exemption authorizes the withholding of "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records

or information (A) *could* be reasonably expected to interfere with enforcement proceedings." *Id.* (emphasis added).[5] To fit within Exemption 7(A), the government must show that (1) a law enforcement proceeding is pending or prospective and (2) release of the information could reasonably be expected to cause some articulable harm. *See Robbins Tire & Rubber*, 437 U.S. at 224, 98 S.Ct. at 2318; *Abramson*, 456 U.S. at 630, 102 S.Ct. at 2064 ("No other provision of FOIA could compensate for the potential disruption in the flow of information to law enforcement agencies by individuals who might be deterred from speaking because of the prospect of disclosure.").

[10] Under this exemption, a court may also take into consideration the requestor's identity. *See Robbins Tire & Rubber*, 437 U.S. at 239-40, 98 S.Ct. at 2325-26; *Grasso v. IRS*, 785 F.2d 70, 76-77 (3d Cir.1986). In *Grasso*, we explained:

> The usual rationale[s] given for [applying Exemption 7(A)] is the danger of witness intimidation, the witness' desire to maintain confidentiality, and concern that premature disclosure would create a chilling effect on

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[5] In 1986 Congress amended this exemption to relax significantly the standard for demonstrating interference with enforcement proceedings. The statute used to read "*would* interfere with" *See Curran v. Dep't of Justice*, 813 F.2d 473, 474 n. 1 (1st Cir. 1987).

> potential witnesses and dry up sources of information.

Id. at 76 (citing *J.P. Stevens & Co., Inc. v. Perry*, 710 F.2d 136, 143 (4th Cir. 1983)).

[11] Here, the district court concluded that the Government had "submitted sufficient evidence that these documents are instrumental to proceedings anticipated in the near future" and, thus, are exempt because they could reasonably be expected to interfere with law enforcement proceedings. *Manna*, 815 F. Supp. at 808. Manna complains, however, that he is only seeking records on himself concerning previous prosecutions. He further argues that, as he has been imprisoned since June 28, 1988, the statute of limitations has expired on crimes for which the government may think he was involved.

We reject Manna's arguments and see no basis to disturb the district court's sound decision. The district court correctly concluded that an exemption for materials relevant to these prosecutions relates not only to prosecutions against the person seeking the information, but also to prosecutions against anyone else. Moreover, the Stewart Declarations and the two sealed declarations provide ample support for the district court's finding that disclosure would interfere with prospective criminal and civil law enforcement proceedings involving the Genovese LCN Family and Manna. *See* Appellant's

Appendix ("App.") at 145-172 ¶¶ 13-53; 292-308 ¶¶ 6-19; 353-354 ¶¶ 5-6. As noted by the district court:

> A declaration filed under seal by [the Government] states that the declarant has read Mr. Stewart's October 2, 1992 declaration concerning Exemption 7 Materials [and] believes that more legal proceedings are forthcoming and believes that the Exemption 7(A) Materials "could reasonably be expected to interfere with law enforcement proceedings described in the Stewart Declaration." (November 19, 1992 Sealed Declaration at ¶¶ 7-10). In fact on Monday, February 1, 1993, a substantial criminal trial commenced before Judge Barry against several alleged powerful members of the Genovese LCN Family. See *United States v. Lombardi, et al.*, Cr. 92-171.

Id.[6]

We find equally persuasive the district court's concern for those persons who have assisted or will assist law enforcement personnel in upcoming legal proceedings. Specifically, it stated:

> The declarations explain that the LCN, specifically the Genevose LCN Family, has a long, sordid and bloody history of racketeer

[6] In this respect, *see also supra* note 3.

> domination and exploitation. Plaintiff, although physically confined in a penitentiary, has not severed his ties to the Genovese Crime Family. Because the LCN is so violent and retaliatory, the names of interviewees, informants, witnesses, victims and law enforcement personnel must be protected. Everyone of the major LCN leadership level defectors in recent years has stated and/or testified that only slight suspicion is needed before deciding to kill a suspected informant. With very few exceptions, the mere accusation by a member in good standing is sufficient to precipitate the issuance of a death warrant from the hierarchy. Moreover, disclosure of FBI reports could result in a chilling effect upon potential cooperators and witnesses in organized crime enforcement investigations.

Id. In short, the Government's submissions adequately demonstrate that prospective criminal or civil (or both) proceedings are contemplated against Manna and other Genovese Crime Family members and, as a result, disclosure would harm these proceedings.

2. *Exemption 7(C)*

[12] The district court also allowed the government to withhold numerous records under Exemption 7(C). *See* 5 U.S.C.A. § 552(b)(7)(C). This exemption authorizes the withholding of records or information compiled for law enforcement purposes

to the extent that production of such records "could reasonably be expected to constitute an unwarranted invasion of personal privacy."[7] *Id.* Exemption 7(C) also requires a balancing of the privacy interest at risk against the public interests, if any, that would be served by disclosure.[8] *Reporters Comm. for Freedom of the Press*, 489 U.S. at 762, 109 S.Ct. at 1476; *McDonnell*, 4 F.3d at 1254.

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[7] This section formerly authorized withholding of such records if they "would constitute" a "clearly unwarranted" invasion of privacy. *See United States Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 756 & n. 9, 109 S.Ct. 1468, 1473 & n. 9, 103 L.Ed.2d 774 (1989).

[8] In presenting his argument on Exemption 7(C) Manna refers briefly to Exemption 6, contending the two have similar underpinnings. Exemption 6 allows the government to withhold "personnel and medical files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.A. § 552(b)(6). In the district court Manna did argue directly that Exemption 6 was inapplicable because a relocated witness may have died. *Manna*, No. 92-1840, slip op. at 7. In its supplemental opinion the district court rejected this argument. *Id.* at 8. It relied on the Government's showing that a search of its records produced no evidence of the relocated witness's death. *Id.* We believe Manna's mere mention of an analogy between Exemption 6 and Exemption 7(C) is insufficient to raise this issue on appeal. To the extent Manna has not waived Exemption 6 we believe the district court's finding that the relocated witness may be alive is not clearly erroneous on this record. *See also United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599-602, 102 S.Ct. 1957, 1960, 72 L.Ed.2d 358 (1982).

[13] We have held that law enforcement officers, interviewees and witnesses involved in criminal investigations, not just suspects, have a "substantial privacy interest" in non-disclosure of their names "because disclosure may result in embarrassment and harassment." *McDonnell*, 4 F.3d at 1255 (citing *Landano*, 956 F.2d at 426). These same individuals have a privacy interest in "not having their names revealed in connection with disclosure of the fact and subject matter of the investigation." *Id.* at 1256 (citing *Landano*, 956 F.2d at 426-27). Passage of time alone is not enough to erase this privacy interest, although the interest may become diluted with the passage of time. *See id.*

[14] Manna appears to seek disclosure of the documents in an effort to prove, in a forthcoming 28 U.S.C.A. § 2255 (West 1994) habeas petition, government misconduct during his criminal prosecution as well as his "innocence." He asserts that not only is his interest at stake, but also the public's interest in the administration of criminal justice and assuring that the innocent are not wrongfully convicted and confined. The alleged wrongdoing on the government's part includes illegal electronic surveillance, failure to turn over *Brady* material and deliberate alteration of words and the voices they are attributed to in intercepted conversations the government used at Manna's trial. Manna also asserts that the district court improperly took into account his identity when it applied Exemption 7(C).

The district court concluded that the Government met its burden of demonstrating that disclosure of certain information would harm the privacy interests of a variety of persons mentioned in the records (*e.g.* persons interviewed by the FBI and mentioned in the interview reports, as well as FBI personnel mentioned in the records). *Manna,* 815 F.Supp. at 808-10. The district court concluded that Manna failed to assert "any public interest" in the information, let alone a public interest that would outweigh the demonstrated privacy interests. *Id,* at 809. The district court stated:

> Although the general rule is that neither the purpose for which the request is made nor the identity of the requester can determine whether documents should be disclosed, the facts in this case necessitate a departure form this general rule. I cannot overlook the fact that plaintiff has been sentenced to 80 years in prison for murder and his participation in organized crime as a leader within one of the most powerful organized LCN families in the nation. Indeed, the Third Circuit has recognized that a LCN Family counts on "its well founded reputation for achieving its objective through violent means." Releasing the names of the people who assisted in the apprehension of organized crime participants would make the assistors unnecessarily vulnerable to possible harassment and retaliation.

Id. at 809-10 (internal citations omitted).

> Again, we are in accord with the district court's findings. Although a court does not usually take a requester's identity into consideration, Manna's position in the hierarchy of a particularly influential and violent La Cosa Nostra family is highly material to the protection of individual privacy interests that Exemption 7(C) is meant to protect. Manna's complaints relating to government misconduct are unfounded. *See Ray,* 502 U.S. at 177-78, 112 S.Ct. at 549 (Exemption 6) ("Mere speculation about hypothetical public benefits cannot outweigh a demonstrably significant invasion of privacy.") Absent proof of misconduct, which is needed to justify invading the demonstrable privacy interests involved here, we "need not linger offer the balance" because "something ... outweighs nothing every time." [9] *National Ass'n of Retired Federal Employees v. Horner, 879 F2d 873, 879 (D.C.cir. 1989)* (Exemption 6) *cert denied,* 494 U.S.1078, 110 S.Ct. 1805, 108 L.Ed.2d 936 (1990).

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[9] Assuming that the failure to turn over alleged *Brady* documents involves some public interest, we are nevertheless satisfied that it is insufficient to outweigh the threatened privacy interests.

3. *Exemption 7(D)*

The district court relied upon Exemption 7(D) in permitting the Government to exclude other documents. *See* 5 U.S.C.A. § 552(b)(7)(D). Exemption 7(D) authorizes the withholding of records or information compiled for law enforcement purposes to the extent that production of such records "could reasonably be expected to disclose the identity of a confidential source and in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation ... information furnished by a confidential source."[10] *Id.*

The district court upheld the FBI's assertion of this exemption as to numerous FBI investigatory reports containing information from sources who were expressly assured confidentiality. *See Manna,* No. 92-1840, slip op. at 15-18. These documents and the relevant circumstances relating to Exemption 7(D) are described in the Supplemental Declaration of Michael D. Turner. *See* App. at 457.

Manna argues that the district court erred in applying the principles enunciated in *United States Dep't of Justice v. Landano,* _____ *U.S.* _____, _____, *113 S.Ct. 2014 , 2020, 124 L.Ed.2d 84 (1993).* He argues it was error to assume that all

[10] We recognize an overlap between Exemptions 7(A) and 7(D) but conclude that here they provide independent grounds for denial of Manna's FOIA claims.

sources were confidential merely because they had been assigned numbers and that the Government should have established that each source specifically furnished information with the understanding that the communication would not be divulged.

[15, 16] If a district court determines that a source provided information under an express assurance of confidentiality or under circumstances from which an assurance of confidentiality can reasonable be inferred, then *all* information provided by the source is protected. *See Schmerler v. FBI, 900 F.2d 333, 338 (D.C.Cir.1990).* Although *Landano* casts doubt on the validity of the concept of implicit confidentiality, *see Landano,* ____ U.S. at _____ _ ____, 113 S.Ct. at 2014-20, *express* assurances of confidentiality clearly meet the requirements of Exemption 7(D). *See id, at* ____ _ ____, *113 S.Ct. at 2019-20.* In this case the Government has shown, contrary to Manna's assertions, that law enforcement sources were given express assurances, that law enforcement sources were given express assurances ofd confidentiality. *See* Supplemental Declaration of Michael D. Turner, App. at 465. Thus the information provided by them should be protected from disclosure.

IV. *Conclusion*

We will affirm the grant of summary judgment in favor of the Government.

BECKER, *Circuit Judge, concurring in part and dissenting in part.*

Judge Hutchinson has written a fine opinion and I agree with his disposition of the government's claim under Exemption 7(D) (Confidential Sources). But while I acknowledge the issues are quite close, I respectfully disagree with the majority's decision concerning the government's other claimed exemptions form the FOIA statute.

I. *Exemption 7(A). (Interference with Enforcement Proceedings)*

I acknowledge the importance of this exemption, but note that it applies only when release of the information "would produce the undesirable results specified," and, like the other FOIA exemptions, it is to be "narrowly construed." *FBI v. Abramson,* 456 U.S. 615, 630, 102 S.Ct. 2054, 2064, 72 L.Ed.2d 376 (1982). Manna submits that he requests only information pertaining to himself and that, having been confined form more than five years, the statute of limitations has expired as to him, and that this defeats the government's claim that disclosure would interfere with enforcement proceedings. As to the crimes for which prosecution is barred by the statute of limitations, it is hard to follow the government's argument, for the reasons set forth in the margin.[1]

[1] The statute of limitations for two of the crimes the government relies on heavily, criminal RICO and obstruction of justice, both have a five-year statute of limitations. *See*

But even assuming that we can look beyond such matters, the agency must certainly aver with sufficient specificity that some criminal proceeding against someone is reasonable imminent.

More specifically, I think it is insufficient that the agency may at some unspecified future point in

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18 U.S.C. § 3282. The statute of limitations generally begins to run when the crime has been completed. *See Toussie v. United States*, 397 U.S. 112, 115, 90 S.Ct. 858, 860, 25 L.Ed.2d 156 (1970). The leading case on the issue of completion of the crime, *United States v. Persico*, 832 F.2d 705, 713 (2d Cir.1987), *cert. denied* 486 U.s. 1022, 108 S.Ct. 1995, 100 L.Ed.2d 227 (1988), held that "the crime of RICO conspiracy is not complete until the pruposes of the conspiracy either have been accomplished or abandoned." As to civil RICO claims, the statute of limitations is four yeras. *See Agency Holding Corp. v. Malley-Duff & Assoc. Inc.*, 483 U.S. 143, 156, 107 S.Ct. 2759, 2767, 97 L.Ed.2d 121 (1987). Since Manna has been imprisoned for over five years, the government cannot be contemplating a RICO or obstruction of justice claim against him unless with respect to the RICO claim the government can show that Manna has committed a predicate act while in prison. *Persico*, 832 F.2d at 714 (concluding that "in order to satisfy the statute of limitations for section 1962(c), the government must demonstrate that a defendant committed at least one predicate racketeering act within the limitations period"). Manna argues there is no evidence in the record to establish this fact even though the agency had access to his visitation records, his mail, and his recorded telephone conversations. Br. of Appellant at 22. The government, of course, has the burden of showing that a FOIA exemption applied. However, the government's submissions are conclusory, lacking in both time frames and any details as to either criminal involvement by Manna or contact by him with LCN associates.

time bring an enforcement proceeding. As I see it, the agency must be actively conducting an ongoing investigation, or should have a present intent to bring an enforcement proceeding in the reasonably specified future. See *Mapother v. Department of Justice,* 3 F.3d 1533, 1540 (D.C. Cir. 1993) (holding that to invoke Exemption 7(A) the agency must show that their disclosure "(1) could reasonable be expected to interfere with (2) enforcement proceedings that are (3) pending or *reasonably anticipated"*(emphasis in original)). The government has not indicated that any such proceedings are in the works, but expects that they may be prosecuted within the spaced of this decade." First Stewart Decl.§33 (A 159-60). I do not think that a span of ten years is sufficient to defect a requestor's otherwise valid claim.

Manna also argues that he only seeking records pertaining to *his* prior conviction, which are subject to statute of limitations. Of course insofar as those records could be used against other defendants as to whom the statute of limitations does not provide a safe haven (because they have committed at least one predicate act within the last five years), the government is correct in asserting that they cannot be released under Exemption 7(A) . First Stewart Decl. released under Exemption 7(A). First Stewart Decl. § 13 (A 145). However, it is my view that the government must not only demonstrate (for each record) that its release would impede a prospective law enforcement proceeding that is

viable, but also that it is impossible to redact the exempt information and release the other information. As I see it, the government might redact out that information in the documents which pertains to enforcement proceedings against other members of the Genovese LCN Family, but turn the rest over to Manna. I do not think the government has met that burden.[2]

In sum, I do not believe that the government has made the required showing that the production of the requested law enforcement records or information could be reasonably expected to interfere with enforcement proceedings which in turn requires

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[2] I acknowledge that, with respect to this exemption, the identity of the requestor, *does* matter, *Grasso v. IRS*, 785 F.2d 70 (3d Cir.1986), but that is so only in limited respects. In dealing with this exception, the district court and the majority focus on the violence of the Genovese Crime Family. That fact would certainly be relevant under Exemption 7(F) (referring to information which "could reasonably by expected to endanger the life or physical safety of any individual"), 815 F.Supp. at 808, but it is hard to see its relevance to Exemption 7(A) except to the extent that the Family might harass, intimidate, or murder a potential victim in a reasonably anticipated proceeding. Similarly, the district court apparently was worried about a general "chilling effect upon potential cooperators and witnesses in organized crime enforcement investigations." 815 F.Supp. at 808. However, that concern is not a cognizable harm under Exemption 7(A); the exemption applies only to particular planned or pending law enforcement *proceedings*. As I stress *infra*, the district court and the majority arguably read Exemption 7(A) to swallow Exmption 7(D), and in effect to be broader than that exemption.

a showing that (1) a law enforcement proceeding is pending or prospective and (2) release of the information could reasonable be expected to cause some articulable harm. *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242, 98 S.Ct. 2311, 2327, 57 L.Ed.2d 159 (1978).

II Exemption 7(C) (Unwanted Invasion of Privacy)

I acknowledge that law enforcement officers, interviewees, and witnesses involved in criminal investigations, not just suspects, have a substantial privacy interest in nondisclosure of their names, "because disclosure may result in embarrassment and harassment." *McDonnell, 4 F.3d at 1255 (citing Landano v. United States Dep't. of Justice,* 956 F.2d 422, 426 (3d Cir.1992), *vacated in part on other grounds, 113 S.Ct. 2014 (1993)).* The interest encompasses disclosure of their names in connection with the subject matter of the investigation *See id.* at 1256. Passage of time alone is not enough to erase this privacy interest, although the interest does diminish over time. *See id.* Moreover, the fact that a convict would like access to the names to interview the witnesses and informants for a collateral attack on his or her conviction directly implicates the witnesses' and informants' privacy interests. *See Landano,* 956 F.2d at 427.

Manna, however, repeatedly asserts that all he is seeking is the records with the names redacted.

This constitutes a far lower threat of invasion of privacy unless, of course, someone could from the context make out the speaker, in which case the identifying information should also be redacted. *See Landano,* 956 F.2d at 426 (noting that individuals have an interest in "not having their *names* revealed in connection with disclosure of the fact and subject matter of the investigation" (emphasis supplied)); *cf. Ray,* 502 U.S. at 173-75, 112 S.Ct. at 547-48 (upholding the agency's disclosure of the subject of refugee interviews with the interviewees' names redacted because while disclosure of the personal interview information would constitute only a *de minimis* invasion of privacy, release of the accompanying names would make the privacy invasion significant, especially since the interviewees could be subject to government retaliation in their home country). Thus, by not considering the possibility (which Manna requested) of redacting the names of the individuals to protect their privacy, the district court, in my view, improperly considered the privacy interest involved in the balancing exercise, and thus it needs to reconsider its conclusions using the proper analysis.[3]

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[3] I also question the district court's conclusion that Manna has asserted no public interest in release of the information. 815 F.Supp. at 809. Part of the reason Manna seeks the records is to discover whether the government withheld *Brady* material at his trial. We have stated that the "public at large has an important stake in ensuring that criminal justice is fairly administered; to the extent disclosure may remedy and deter *Brady* violations, society stands to gain." *Ferri v. Bell,* 645 F.2d 1213, 1218 (3d Cir. 1981) (prisoner sought

The exemption 7(C) issue also implicates the question of the identity of the requester. the government, conceding that the court may not consider the requester's identity, disputes Manna's characterization that the court did so here, and contends that

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information to overturn a conviction) ("Although the motivation behind Ferri's request is....personal, a FOIA request for material implicating the *Brady* rule simultaneously advances an 'indirect public purpose' satisfying the second prong of the test for disclosure under one of the privacy-based exemptions."), *modified*, 671 F.2d 769, 771 (3d Cir. 1982) (per curiam) ("[T]he purpose of the remand is simply to determine whether a *Brady* claim exists that is sufficiently colorable so that the public interest in fair administration of justice warrants disclosure despite Exemption 7(c).")

As a rule, the public's interest in exposing government corruption and wrongdoing is the primary rationale for FOIA. *See e.g., NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242, 98 S.Ct. 2311, 2327 57 L.Ed.2d 159 (1978) ("The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.") Thus, I think that Manna may have a viable legal theory as to the facts. He avers that on December 21, 1986, "the New York Telephone Company removed a '189B Tek Com 88MH Load Com' from my telephone line." First Manna Decl. ¶ 8 (A 192); Second Manna Decl. ¶ 5 (A 334). The agency responds with evidence that on *January 20, 1987*, the district court ordered a pen register attached to Manna's lines. Sealed Hanna Decl. ¶ 6 (SA 3 - 4). Given the discrepancy in the dates, it seems to me the district court should not have concluded in the agency's motion for summary judgment that no public interest was implicated by Manna's request.

> a district court may consider all relevant facts in assessing the nature and extent of the invasion of privacy which result from disclosure. Such facts in this case include the ability and willingness of the violent, powerful and ongoing criminal institution, in which Mr. Manna held a leadership role, to harm or otherwise invade the privacy of, for example, persons it suspects of cooperation with law enforcement authorities.

Br. of Appellee at 22 n. 13. While I agree that this information is relevant under Exception 7(F), I disagree with the government that the threat of retaliation is a cognizable concern under Exemption 7(C). Retaliation has nothing to do with privacy, and, moreover, such a construction of Exemption 7(C) would eliminate the need for Exemption 7(F), violating the well known rule of statutory construction not to interpret language to render other language surplus verbiage. *See* Exemption 7(F) (referring to information which could reasonably be expected to endanger the life or physical safety of any individual").

In any case, since the district court may have considered Manna's personal identity as the requester, rather than him as the subject matter of the request (which would equalize the analysis between all requesters), in its analysis, the district court should, in my view, reconsider the matter using the proper standard.

I would therefore affirm in part, reverse in part and remand for further proceedings.

Appendix B - Opinion of the United States Disctrict Court for the District of New Jersey, Decided March 4, 1993 [Pages 32a - 85a]

Louis A. MANNA, Pro Se,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF JUSTICE, et. al.,

Defendants.

Civ. No. 92-1840.

United States District Court,
D. New Jersey

March 4, 1993

Louis Anthony Manna, pro se.

Michael Chertoff, U.S. Atty., Robert M. Hanna, Asst. U.S. Atty., U.S. Attorney's Office, Newark, NJ, for defendants.

OPINION

DEBEVOISE, District Judge.

Plaintiff, Louis A. Manna, presently incarcerated in the United States Penitentiary at Leavenworth, Kansas, instituted this action under the Freedom of Information Act, 5 U.S.C. §552 ("FOIA") to obtain certain records in the possession of the United States Department of Justice (the "Justice Department"). The Justice Department and the United States Attorney for the District of New Jersey (collectively referred to as "defendants") move

for summary judgment and plaintiff cross-moves for summary judgment and for an index of the withheld documents in accordance with *Vaughn v. Rosen*, 484 F.2d 820 (D.C.Cir.1973), *cert. denied*, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974) ("*Vaughn* index").[1]

The FOIA confers jurisdiction on this court pursuant to 5 U.S.C. § 552(a)(4)(B).

For the reasons provided below, defendants' motion for partial summary judgment is granted in its entirety except with respect to the information described in the Turner Declaration. Defendants may resubmit their application regarding this information as directed below in this opinion. Plaintiff's cross-motion for summary judgment is denied and plaintiff's cross-motion for a *Vaughn* index is also denied.

SUMMARY OF FACTS AND PROCEDURAL HISTORY

In order to fully appreciate defendants' reluctance to comply with plaintiff's document

[1] "A *Vaughn Index* is a system of itemizing and indexing that correlates each of the government's justifications for its refusal to disclose the documents with the actual portions of the documents at issue." *Lewis v. I.R.S.*, 823 F.2d 375, 377 n. 3 (9th Cir. 1987).

demand, a brief background of plaintiff's criminal activities is useful.

Before being incarcerated, plaintiff held the number three position of "consigliere"[2] for over eight years in a powerful Mafia crime family-the Genovese Crime Family.[3] (Declaration of Robert C. Stewart, October 2, 1992 at ¶28.) In the Northern New Jersey-New York Metropolitan area, the Genovese LCN Family has historically been one of the most powerful of the American Mafia criminal organizations. Today, the New Jersey contingent of the Genovese Family, through an entrenched network of racketeering operations, preys upon the transportation, shipping and construction industries. The Genovese LCN Family uses violence, intimidation and obstruction to further its organized criminal activities.

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[2] The "consigliere" is a member of the second tier in the chain of command for an LCN crime family. *United States v. Pungitore*, 910 F.2d 1084, 1098 (3d Cir.1990) (citations omitted). The first tier is reserved for the "boss." The Third Circuit has explained that "[t]he consigliere functions as an advisor to the boss and assists in the settlement of disputes among members. . . ." *Id.*

[3] The existence of the Genovese LCN Family was described in the RICO case of *United States v. Tieri*, 80 Cr. 381 (S.D.N.Y.). On November 21, 1980, Frank "Funzi" Tieri was convicted of being the "boss" of that Family and of operating its affairs through a pattern of racketeering activity which involved predicate acts of murder, extortion, loansharking, receipt of stolen property and bankruptcy fraud.

The single most efficacious law enforcement technique in combating the LCN has been the utilization of historical materials in conjunction with electronic surveillance evidence. (*Id.* at ¶13.) The Federal Bureau of Investigation ("FBI") used electronic surveillance investigation to collect evidence regarding plaintiff's domination over New Jersey construction unions which eventually led to a successful prosecution. (*Id.* at ¶29.) In 1989, a jury in this District found plaintiff guilty of serious offenses including, but not limited to, offenses under the Racketeer Influence and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO") involving predicate violations of the Hobbs Act (extortion) and Taft-Hartley Act (bribery), organized gambling and three separate murder predicates relating to the affairs of the Genovese LCN Family. (*Id.* at 29.) The convictions for conspiracy to murder in aid of racketeering involved the planned murders of John and Gene Gotti, high-ranking members of another crime family, the "Gambino Family" of the LCN, and the notorious murder of Irwin Schiff, which was carried out on August 8, 1987 in a New York City restaurant. (*Id.* at ¶30.); *see United States v. Manna, et al.*, Cr. 88-239 (D.N.J. Oct. 12, 1989), *aff'd without opinion*, 919 F.2d 733 (3d Cir. 1990), *cert. denied*, ____U.S.____, 111 S.Ct. 1418, 113 L.Ed.2d 471 (1991). Following the conviction, Judge Barry sentenced plaintiff, then sixty years old, to a total of eighty (80) years imprisonment. (Id. at ¶31.) The

court also imposed a fine of $250,000 and a special assessment of $350, immediately payable. (*Id.*)

By letter dated May 27, 1991 and addressed to the United States Attorney for the District of New Jersey, plaintiff made a general request for "all records in reference to [him]self" and specifically for "all records in regard to any electronic surveillance, whether legal or illegal" pursuant to the FOIA and the Privacy Act, 5 U.S.C. § 552a ("PA").[4] (Declaration of Virginia L. Wright, October 1, 1992 at ¶2.) The Executive Office for United States Attorneys ("EOUSA"),[5] in conjunction with the United States Attorney's Office, processed plaintiff's record request and located records responsive to his request (the "Responsive Records"). Defendants

[4] The Privacy Act establishes access for individuals to records of personal information maintained about them by the federal government. 5 U.S.C. §552a. Except for arrest records, Section (j)(2) of the Privacy Act exempts from disclosure material reporting investigative efforts pertaining to the enforcement of criminal laws including efforts to prevent, control, or reduce crime and apprehend criminals. when Section (j)(2) of the Privacy Act, read in conjunction with 28 C.F.R. §16.96, requires denying the requester access to criminal investigative files, Section (t)(2) of the Privacy Act mandates that the request also be processed pursuant to the FOIA.

[5] The EOUSA is a component of the Department of Justice located in the District of Columbia. The Freedom of Information Act/Privacy Act Unit of the EOUSA processes the FOIA requests directed to the United States Attorneys' Offices nationwide. (Oct. 1, Wright Decl. at ¶1.)

understood plaintiff's general request to mean records which refer to him by name (including nicknames and initials), records of his image (e.g. photographs) or voice (*e.g.* audio tapes) (Oct. 1, Wright Decl. at ¶9.) Defendants searched for the files compiled for the investigation and subsequent prosecution of plaintiff in the case captioned *Unites States v. Manna*, Cr. 88-239. (*Id.*) However, records which merely cited the case caption of plaintiff's criminal prosecution, but did not otherwise refer to plaintiff were excluded. (*Id.*)

On or about October 25, 1991, the EOUSA provided plaintiff with some of the Responsive Records and provided additional records on or about June 10, 1992 and September 30, 1992. (*See* Oct. 1, Wright Decl. ¶¶10-14 and Exhibits G, J & K attached thereto.)

Copies of the following Responsive Records were made available to plaintiff:

1. Trial Transcripts in Criminal Action No. 88-239;

2. Trial exhibits in Criminal Action No. 88-239 (excluding tangible objects, which are not considered "agency records" under FOIA);

3. Pre-trial transcripts and motions, orders, judgments, notices of alibi, indictments, and

correspondence in Criminal Action No. 88-239; and

4. Miscellaneous records which refer to plaintiff:

a. Plaintiff's tax returns, other tax information, checks, money orders, bills, receipts and like documents;

b. Documents relating to proceedings holding plaintiff in contempt of the New Jersey State Commission of Investigation for refusal to answer questions pursuant to a subpoena;

c. An FBI arrest record for plaintiff;

d. Written statements of Vincent ("Fish") Cafaro;

e. Newspaper clippings and a June 28, 1988 press release from the United States Attorney's Office; and

f. Miscellaneous trial transcripts.

(*See* Oct. 1, Wright Decl. Exhibits G, J & K attached thereto).

Although other Responsive Records were found, defendants withheld them from plaintiff

based on one of five grounds: (1) Exempted by 5 U.S.C. §552(b)(7); (2) Title III Materials, (3) Grand Jury Materials, (4) Pen Register Materials and (5) Privileged Materials.[6]

Certain records which originated either from the FBI or the Bureau of Prisons ("BOP") were also withheld. Pursuant to 28 C.F.R. § 16.42[7] these documents were referred to the FBI and BOP respectively for review and a direct response to plaintiff. The FBI and BOP subsequently made their own determination as to which documents were disclosable. (*See* Dec. 16, 1992 Declaration of Michael D. Turner; Dec. 11, 1992 Declaration of Marcus Williams.) On November 10, 1992, the BOP forwarded seventeen pages to plaintiff with certain personal identifiers redacted. (Williams

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[6] These categories are addressed below at length in the discussion section of this opinion.

[7] When a component of the Department of Justice, *e.g.* separate bureau, office, board, division *etc.*, 28 C.F.R. §16.42(c)(2), receives a request for records under the Privacy Act of 1974, the receiving component is primarily responsible for responding to the request. 28 C.F.R. §16.42(a). If the request is for a record containing information which relates to an investigation of a possible violation of cirminal law or to a criminal law enforcement proceeding and the record was generated by a component other then the receiving component, the receiving component is required to consult the other component before responding to the request. 28 C.F.R. §16.42(c), (d).

Decl. at ¶5.) Defendants released a copy of an FBI 1965 "rap sheet." (Def.Rpl.Let.Br.Jan.6, 1993 at p. 3, *see also* Turner Decl. at ¶3, n. 2.) On October 21, 1992, the FBI also released to plaintiff seven documents, six with redactions, received from the EOUSA. (*Id.* at ¶15.)

By letter dated October 28, 1991, plaintiff appealed the EOUSA's disclosure determination to the Office of Information and Privacy ("OIP"). (Oct. 1, Wright Decl. at ¶11 and Exhibit H attached thereto.) By letter dated March 25, 1992, the OIP affirmed the EOUSA's disclosure determination and advised plaintiff that he had the option of a judicial review of his appeal in the United States District Court. (Id. at ¶12.)

On May 1, 1992, plaintiff filed this action for declaration and injunctive relief under the Freedom of Information Act, 5 U.S.C. §552, to compel defendants to produce all records in their possession and control which referred to him in connection with his criminal conviction. *See United States v. Manna*, Crim. No. 88-239 (D.N.J. Oct. 12, 1989), *aff'd without opinion*, 919 F.2d 733 (3d Cir.1990), *cert. denied*, ___U.S.___, 111 S.Ct. 1418 (1991).

In August 1992, plaintiff moved for an order directing the DOJ to provide an index of the withheld documents pursuant to *Vaughn v.*

Rosen, 484 F.2d 820 (D.C.Cir. 1973), *cert. denied,* 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974). The DOJ, cross-moved for dismissal of the Complaint pursuant to Fed.R.Civ.P. 12(b)(1) and (b)(6). In an unpublished letter opinion filed August 24, 1992, I denied both motions. *Manna v. U.S. Dep't of Justice et al.,* Civ. No. 92-1840, slip op. (D.N.J. August 4, 1992). I concluded that granting plaintiff's motion for a *Vaughn* index would be premature in light of defendants' intention to move promptly for summary judgment. I reasoned that a summary judgment might moot the need for a *Vaughn* index. *Id.* at 2. Moreover, a *Vaughn* index in this case might present the same risks that production of the underlying documents would present. *Id.* Lastly, I denied defendants' motion to dismiss after rejecting defendants' argument that plaintiff failed to sue the agency as opposed to a federal officer. *Id.* at 3.

DISCUSSION

A. FOIA EXEMPTIONS

[1] The Supreme Court has recognized that the FOIA sets forth a policy of broad disclosure of government documents in order " 'to ensure an informed citizenry, vital to the functioning of a democratic society.' " *FBI v. Abramson,* 456 U.S. 615, 621, 102 S.Ct. 2054, 2059, 72 L.Ed.2d 376

(1982) (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242, 98 S.Ct. 2311, 2327, 57 L.Ed.2d 159 (1978)). As a result, the FOIA requires federal agencies to make promptly available any records requested of it by any person so long as the request "reasonably describes such records." *Landano v. U.S. Dep't of Justice et al*, 956 F.2d 422, 425 (3d Cir. 1992) (quoting 5 U.S.C. § 552(a)(3)). If an agency improperly withholds the requested documents, a federal district court may order production. *Id.* However, there are nine specific exemption categories that justify an agency's withholding documents. *Id.; see* 5 U.S.C. § 552(b)(7). Since "[t]he Act creates a presumption in favor of disclosure," the agency has the burden of demonstrating that a statutory exemption is applicable. *See Ferri v. Bell*, 645 F.2d 1213, 1221 (3d Cir.1981), *modified on other grounds* 671 F.2d 769 (3d Cir.1982); *Committee on Masonic Homes of the R.W. Grand Lodge v. NLRB*, 556 F.2d 214, 218 (3d Cir.1977).

The documents withheld from plaintiff fall into the following FOIA exemption categories: Exemption 7, Exemption 3 and Exemption 5. These categories and the documents defendants claim they protect from disclosure will be discussed seriatim.

Exemption 7 Materials

Defendants assert that some of the documents they seek to withhold from plaintiff are exempted by

FOIA Exemptions 7(A), 7(C) and 7(F) which provide:

> (7) records or information compiled for law enforcement purposes, but only the extent that the production of such law enforcement records or information
>
> (A) could reasonably be expected to interfere with enforcement proceedings ...
>
> (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy ...
>
> (F) could reasonably be expected to endanger the life or physical safety of any individual ....

5 U.S.C. 552(b)(7)(A), (C) & (F).

"The language of the Exemption indicates that judicial review of an asserted Exemption 7 privilege, requires a two-part inquiry. First, a requested document must be shown to have been an investigatory record 'complied for law enforcement purposes.' If so, the agency must demonstrate that release of the material would have one of the six results specified in the Act." *FBI v. Abramson*, 456 U.S. at 621, 102 S.Ct. at 2059 (quoting 5 U.S.C. §552(b)(7)).

[2, 3] Affidavits submitted to the court supporting the agency's decision to withhold documents must contain more than general and conclusory language. *Ferri v. Bell*, 645 F.2d at 1221. Rather, the affidavit must provide a relatively detailed analysis in manageable segments of the basis for the claimed exemption. *Id.* (*citing Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C.Cir.1973), *cert. denied*, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974)). If the affidavits are sufficiently detailed, the district court is not required to look further. *Lewis v. I.R.S.*, 823 F.2d 375, 378 (9th Cir.1987). The agency "need not specify its objections [to disclosure] in such detail as to compromise the secrecy of the information." *Lewis*, 823 F.2d at 377 (quoting *Church of Scientology v. United States Dep't of the Army*, 611 F.2d 738, 742 (9th Cir.1979)). "But if the affidavits are 'too generalized,' the district court may, *in its discretion*, examine the dispute documents *in camera* in order to make 'a first-hand determination of their exempt status.' " *Lewis*, 823 F.2d at 378 (emphasis in original). However, *in camera* inspection should not be resorted to lightly.[8] *Id.*; *see Vaughn v. Rosen*, 484 F.2d 820, 825 (D.C.Cir.1973).

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[8] "Before the court orders *in camera* inspection, the Government should be given the opportunity to establish by means of testimony or detailed affidavits that the documents are clearly exempt from disclosure. The burden remains on the Government under this law." S.Rep. No. 1200, 93d Cong., 2d Sess. 9, *reprinted in* 1974 U.S.C.C.A.N. 6267, 6287-88.

In Support of its motion, defendants have provided the declarations of Robert C. Stewart, an Assistant United States Attorney and Chief of the Organized Crime Strike Force Division of the United States Attorney's Office for the District of New Jersey, the declarations of Virginia L. Wright, a supervisory paralegal specialist for the EOUSA, the declarations of Evelyn F. Block, a paralegal specialist employed by the Office of the United States Attorney for the District of New Jersey, the declarations of Robert M. Hanna, an Assistant United States Attorney for the District of New Jersey, the declaration of Marcus Williams, an Attorney-Advisor in the Employment Law and Information Branch of the Office of General Counsel for the Federal Bureau of Prisons and the declaration of Michael D. Turner, a Special Agent assigned to the Freedom of Information-Privacy Acts Section of the Information Management Division at FBI Headquarters ("FBIHQ") in Washington, D.C.

I. *Exemption 7(A)*

[4-6] Section (b)(7)(A) exempts from disclosure "investigatory records compiled for law enforcement purposes" when production of such records would "interfere with enforcement proceedings." *Docal v. Bennsinger*, 543 F.Supp. 38, 44 (M.D.Pa.1981). It is well recognized that, pursuant to this exemption, an agency may withhold documents stemming from an ongoing criminal

investigation if disclosure would harm or interfere[9] with a subsequent enforcement proceeding. *Id.* Exemption 7(A) is "intended to prevent premature disclosure of the investigatory materials which might be used in a law enforcement action." *FBI v. Abramson*, 456 U.S. at 621, 102 S.Ct. at 2059. Determination of "interference" need no be done on a case-by-case basis. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. at 223, 98 S.Ct. at 2317. Rather, an agency may rely on generic approach by grouping documents into categories that are

> sufficiently distinct to allow a court to grasp "how each ... category of documents, if disclosed, would interfere with the investigation." *Campbell [v. Department of Health & Human Services]*, 682 F.2d [256] at 265 [(D.C.Cir.1982)]. The hallmark of an acceptable category is thus that it is *functional*; it allows the court to trace a

[9] " 'Interference' under the terms of the statute encompasses a wide range of concerns. Grounds which have been repeatedly acknowledge by the courts include fears of disclosure of: (1) evidence, (2) witnesses, (3) prospective testimony, (4) the reliance placed by the government upon the evidence, (5) the transactions being investigated, (6) the direction of the investigation, (7) government strategy, (8) confidential informants, (9) the scope and limits of the government's investigation, (10) prosecutive new defendants, (11) materials protected by the Jencks Act, (12) attorney work product, (13) the methods of surveillance, [and] (14) subjects of surveillance." *Docal v. Bennsinger*, 543 F.Supp. at 44 n. 12.

> rational link between the nature of the document and the alleged likely inference.

Bevis, 801 F.2d at 1389 (quoting *Crooker v. Bureau of Alcohol, Tobacco and Firearms*, 789 F.2d 64, 67 (D.C.Cir1986)) (emphasis in original). When an agency elects the generic approach, the agency must satisfy a tripartite standard. See *Bevis v. United States Dep't of State*, 801 F.2d 1386, 1389-90 (D.C.Cir. 1986). "First, it must define its categories functionally. Second, it must conduct a document-by-document review in order to assign documents to the proper category. Finally, it must explain to the court how the release of each category would interfere with enforcement proceedings." *Id.* at 1389-90.

For most of the documents, defendants have met the *Bevis* tripartite standard. The declarations submitted in support of defendants' summary judgment motion functionally group the documents in the following defined categories: FBI Reports, Labor Reports, Surveillance Records, Privileged Materials, BOP Materials *etc.* The declarants have conducted a document-by-document review and assigned documents to a particular category. Lastly, they have explained how the release of the documents in each category would interfere with law enforcement proceedings. In the few instances where a declarant has failed to do so, summary judgment has been denied.

Appendix B
[Opinion of the USDC for the District of New Jersey]

Based on the October 2, 1992 and December 18, 1992 Stewart Declarations and the November 18, 1992 Sealed Declaration, defendants have adequately met their burden of showing that the following documents are justifiedly withheld based on Exemption 7(A):

a. *FBI Reports 1 through 8* contain the results of interviews which were conducted in connection with a particular gangland slaying as to which plaintiff and others are suspects (Oct. 2, Stewart Decl. at ¶38.) This homicide investigation is one of several Genovese family homicides which remain uprosecuted, but not inactive. *(Id.)* Some of the information deals with the potential motive for the murders *(Id.)*

b. *FBI Reports 9 through 12, 15 and 16* are interviews relating to plaintiff's and the Genovese Family's improper influence with organized labor. (*Id.* at ¶39.) Related and derivative investigations are still open and pending. Some of those interviewed are innocent citizens who fall into the category of victims. Other interviewees who are more loyal to plaintiff have provided useful information and are most apt to appear in future trials as defense witnesses.

c. *FBI Report 14* contains the statements of two persons who are potential witnesses

with respect to a suspected extortion. (*Id.* at ¶41.) There is reason to suspect that these persons participated in crimes with plaintiff and the Genovese LCN Family. These statements contain information regarding crimes still under investigation.

d. *FBI Reports 17 and 18* are the statements of innocent citizens about certain business transactions and relationships. (*Id.* at ¶ 42.)

e. *FBI Report 19* contains information from an individual who can place certain organized crime figures in a particular location with respect to the successors of the Manna-Related Investigations. (*Id.* at ¶43.)

f. *FBI Reports 20, 21 and 22* are interviews of sensitive sources regarding a suspected episode involving plaintiff's obstruction of justice. The investigation is ongoing (*Id.* at ¶44.)

g. *FBI Reports 23 and 24* also contain the statements of two individuals concerning a particular suspected obstruction of justice by plaintiff. (*Id.* at ¶45.) The investigation into this obstruction remains open.

h. *FBI Reports A and B* contain the statements of plaintiff's co-defendants at the time of his

arrest. (*Id.* at ¶46.) They were not used at trial and are not *Brady* material as to Manna. Both reports contain information about the Genovese LCN Family's influence within organized labor. Investigations in this area are active.

i. *FBI Report C* comprise two entries of information provided to the FBI by a confidential source. (*Id.* at ¶42.) Although the name of the source is "blacked out," plaintiff may be able to identify him from the content of the documents because the source testified at plaintiff's trial. The two entries contain information about the New Jersey Branch of the Genovese LCN Family's operations and criminal activity. This information is relevant to an open investigation.

j. *FBI Report 101* contains an interviewee's statement about crimes which still have the potential for prosecution. (Dec. 18, Stewart Decl. at ¶11.)

k. *FBI Report 102* is a report of an interview of a long-time Genovese LCN Family associate. He has identified individual suspects, transactions and locations of certain transactions. This interviewee participated in crimes with plaintiff. Active investigation is being pursued. Disclosure

of the interviewee would not only jeopardize the investigation, but also could result in severe retaliation. (*Id.* at ¶12.)

l. *FBI Report 103* contains an interviewee's statement about the interviewee's participation in criminal activity and possible participation in organized criminal activity with plaintiff and/or plaintiff's white collar associates. (*Id.* at ¶13).

m. *FBI Reports 204*[10] comprise periodic (usually quarterly) reports (approx. 79 documents)[11] which synopsize and provide varying degrees of detailed information about the state of an investigation dating from 1961 to 1973. These documents are studied today to determine whether any patterns of criminal activity have taken place.[12] (*Id.* at

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[10] According to one of the Stewart Declarations, for reasons unknown, some reports appear to be missing altogether and others appeal to be lacking all pages except the first page which contains a synopsis. (Dec. 18, Stewart Decl. at ¶14.)

[11] Thirteen of these documents are not part of the defendants' summary judgment request, but are being further evaluated by the government.

[12] For example, Manna's criminal activities on behalf of the Genovese Crime Family during the late 1950's and early 1960's became important evidence in a civil RICO action over twenty years later in proving that the Genovese Family dominated a labor union. (Dec. 18, Stewart Decl. at ¶15.)

¶15.) These documents could be used for obstructing justice. (*Id.* at ¶16.) These documents include informant information, (*Id.* at ¶17(a)), named citizens who are either victims of organized crime, participants in criminal activity or associates of suspects under investigation (*Id.* at ¶17(b)), identification of accomplices who are subject of investigations (*Id.* at ¶17(c)), names from toll records and Department of Motor Vehicle files (*Id.* at ¶17(d)) and reports from unsolved homicides or violent crimes. (*Id.* at 17(e).). Hence, document numbers F1-F66[13] excluding F64 of the FBI Reports 204 are protected by exemption 7(A).

n. *Labor Report 1* contains information about the hierarchy of the Genovese Crime Family, the activities of plaintiff's colleagues and an unsolved homicide. Twelve individuals are mentioned in this report. (*Id.* at ¶18.)

(citing *United States v. Local* 560 (*I.B.T.*), *et al.*, 581 F.Supp. 279, 304-05 (D.N.J.1984)).

[13] These documents are referred to as documents 1 through 66 in paragraph 17 of the December 18, 1992 Stewart Declaration. In order to avoid confusion with documents 1 through 24 enumerated in the October 2, 1992 Stewart Declaration, the letter F is added as a prefix to the documents enumerated in the December 18, 1992 declaration.

o. *Labor Report 2* explains the status of a number of investigations, discloses connections and reveals the extent of law enforcement's knowledge. (*Id.* at ¶19.) Defendants must disclose any investigative information that has resulted in a prosecution unless this information is being relied upon to bring subsequent prosecutions or the information is so inextricably intertwined with other confidential information such that it is impracticable to separate.

p. *Surveillance Records* in which plaintiff was either observed, overhead or mentioned. These records are intended to be used as evidence in an anticipated legal action. (Oct. 2, Stewart Decl. at ¶51-52; Nov. 18, Sealed Decl. at ¶10.)

q. *Miscellaneous Records* Lastly, a statement of a co-defendant of plaintiff, purportedly made under the influence of a "chemo-hypnotic medium." (*Id.* at ¶53.)

[7] Defendants have submitted sufficient evidence that these documents are instrumental to proceedings anticipated in the near future. A declaration filed under seal by defendants states that the declarant has read Mr. Stewart's October 2, 1992 declaration concerning Exemption 7 Materials, (*see* categories a.-h. *infra*), believes that more legal proceedings are forthcoming and believes that the

Exemption 7 Materials "could reasonably be expected to interfere with law enforcement proceedings described in the Stewart Declaration." (November 19, 1992 Sealed Declaration at ¶¶7-10.) In fact on Monday, February 1, 1993, a substantial criminal trial commenced before Judge Barry against several alleged powerful members of the Genovese LCN Family. *See United States v. Lombardi, et al.*, Cr. 92-171. The principal defendant in that RICO prosecution, Salvator "Sally Dogs" Lombardi, allegedly inherited a substantial portion of the Genovese LCN Family criminal operations formerly controlled by Manna, including labor racketeering and construction industry extortions.

The Stewart Declarations elaborate on how disclosure of the information will have a profoundly negative effect on upcoming legal proceedings and on individuals who have assisted law enforcement personnel. Release of certain information will aid the Genovese LCN Family in obstructing justice by enabling them to determine the extent of law enforcement knowledge, uncover law enforcement strategy and anticipate upcoming civil RICO and criminal actions. The declarations explain that the LCN, specifically the Genovese LCN Family, has a long, sordid and bloody history of racketeer domination and exploitation. Plaintiff, although physically confined in a penitentiary, has not severed his ties to the Genovese Crime Family. Because the LCN is so violent and retaliatory, the names of interviewees, informants, witnesses, victims and law

enforcement personnel must be protected. Everyone of the major LCN leadership level defectors in recent years has stated and/or testified that only slight suspicion is needed before deciding to kill a suspected informant. With very few exceptions, the mere accusation by a member in good standing is sufficient to precipitate the issuance of a death warrant from the hierarchy. Moreover, disclosure of FBI reports could result in a chilling effect upon potential cooperators and witnesses in organized crime enforcement investigations. A wall of silence will impede the criminal justice system while benefiting the perpetuation of organized crime. (Oct. 2, Stewart Decl. at ¶48.) Mr. Stewart explains that the chain of on-going prosecutions concerning organized crime could be broken by disclosure of the FBI Reports. Lastly, a number of these witnesses are of limited means and cannot afford to protect their families by relocating. Under *Docal v. Bennsinger*, all of these reasons are recognized by federal courts as legitimate reasons for non-disclosure. *See* 543 F.Supp. at 44 n. 12; *see supra* at n. 5. Therefore, granting summary judgment in defendants' favor is proper with respect to the documents listed above.

ii. *Exemption 7(C)*

Exemption 7(C) requires a *de novo* balancing of the privacy interests against public interests. *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 762, 109 S.Ct.

1468, 1476, 103 L.Ed.2d 774 (1939); *Landano v. Department of Justice*, 956 F.2d 422, 425-26 (3d Cir.1992). The third Circuit has held that "individuals who are associated with a criminal investigation have a privacy interest under Exemption 7(C) of the FOIA such that the government may be justified in refusing to disclose their names." *Landano*, 956 F.2d at 427. Suspects, witnesses, interviewees, and investigators have been held to possess privacy interests under Exemption 7(C). *Id.* at 426. The Third Circuit has noted that suspects in an investigation have the most obvious privacy interest in not having their identities revealed. *Id.* In addition, disclosure of interviewees and witnesses may result in embarrassment and harassment. *Id.* "Criminal investigations turn up a myriad of details about the personal lives of witnesses and interviewees and for some, disclosure of the fact of cooperation." *Id.* Even law enforcement personnel possess a privacy interest under Exemption 7(C) in not having their identities disclosed. *Id.* "While the privacy interests of those involved in a criminal investigation may become diluted by the passage of time, several courts have recognized that the potential for embarrassment and harassment may endure for many years." *Id.* at 427.

[8] The following documents are not subject to disclosure because the privacy interest and/or potential for embarrassment/harassment of the interviewee, informant or law enforcement officer

outweighs the public interest in disclosing their names:

a. *FBI Report 13* contains the result of an interview concerning an alleged murder contract which was never carried out, if indeed it ever existed. (Oct. 2, Stewart Decl. at ¶40.) The investigation is closed, but it is not a matter of public record. This document merely mentions plaintiff tangentially.

b. *Miscellaneous Records* one page redacted letter to a planned prosecution witness. (*Id.* at ¶54.)

c. *FBI Reports* listed in categories a. through m. above under Exemption 7(A) materials.

d. *Litigation Worksheets* listing law enforcement personnel responsible for executing arrests, executing search warrants and being available during the *Manna* proceedings. (Dec. 18, Stewart Decl. at ¶23(d).)

e. *FBI Reports 204* specifically F1-F6, F8-F14, F17, F20, F23A, F24-F27, F31-F35, F38-F40, F44, F47-F50, F53-57, F59, F61, F63, F65-F66 (Dec. 18, Stewart Decl. at ¶17(a), (b), (d).)

f. *Identification Numbers* of persons, *e.g.* social security numbers and drivers license numbers. (Dec. 11, 1992, Marcus Williams Decl. ¶¶3-5).

Because the LCN is so violent and retaliatory, the names of interviewees, informants, witnesses, victims and law enforcement personnel must be safeguarded. *See supra* pp. 808-809. Plaintiff has not asserted any public interest that these private interests should be weighed against.[14] Plaintiff has only asserted his own personal interest, plaintiff is not entitled to a copy of these documents. *See U.S. Dep't of State v. Ray*, __U.S.__, 112 S.Ct. 541, 116 L.Ed.2d 526 (1991).

[9] Plaintiff nonetheless urges this court to focus on whether the privacy interest promotes the purposes of the FOIA rather than the particular purpose for which the document is being requested. (Pl.Resp.Br. at 3.) Although the general rule is that neither the purpose for which the request is made nor the identity of the requester can determine whether documents should be disclosed, *see Landano*

[14] Plaintiff directs the court's attention to *The Globe Newspaper Co. and Kevin Cullen v. FBI*, Civ. Act. No. 91-13257-Z, 1992 WL 396327 (D.Mass.Dec. 29, 1992) where the court ordered the government to honor the plaintiff's FOIA request. The *Globe* case is easily distinguishable from the case at bar because there the court found a public interest, *Id.* at 11-12, that outweighed the individual privacy interest which the court concluded was *de minimis*. *Id.* at 10.

v. U.S. Dep't of Justice, 956 F2d at 428; *United States Dep't of State v. Ray*, ___U.S.___, 112 S.Ct. 541, 116 L.E.2d 526 (1991); *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 771, 109 S.Ct. 1468, 1480, 103 L.Ed.2d 774, 794 (1989), the facts in this case necessitate a departure from this general rule. I cannot overlook the fact that plaintiff has been sentenced to 80 years in prison for murder and his participation in organized crime as a leader within one of the most powerful organized LCN families in the nation. Indeed, the Third Circuit has recognized that a LCN Family counts on "its well-founded reputation for achieving its objectives through violent means." *United States v. Pungitore*, 910 F.2d 1084, 1098 (3d Cir. 1990), *cert. denied*, ___U.S.___, 111 S.Ct. 2009, 114 L.Ed.2d 98 (1991). Releasing the names of people who assisted in the apprehension of organized crime participants would make the assistors unnecessarily vulnerable to possible harassment and retaliation.

[10] Now turning to the documents/information described in the declarations of Michael D. Turner and Marcus Williams, I find that only the information in the Williams Declaration is exempt from disclosure. the Turner Declaration lacks the requisite specificity to grant summary judgment. The Turner Declaration only covers eight documents, yet a document-by-document method of evaluation was not employed. For a declaration evaluating so few documents, each document or the portion contained

therein sought to be protected should have been cross-referenced to the statutory provision that allegedly provides the protection. Finally, the Turner Declaration provides no factual justification for the withholding. Instead, the declaration heavily relies on conclusory statements and the citations of statutes. More facts are needed about the documents themselves and an explanation how the release of the information would violate the privacy interests, interfere with ongoing investigations or pose a potential risk to certain individuals. Due to these inadequacies, summary judgment is denied with respect to the documents and/or the redactions described in the Turner declaration.

iii. *Exemption 7(F)*

[11] Exemption 7(F) permits the withholding of law enforcement records where disclosure could reasonably be expected to "endanger the life or physical safety of any individual...." 5 U.S.C. §552(b)(7)(F). Considering the broad language of the phrase "any individual" in conjunction with the violent and murderous nature of plaintiff and the Genovese LCN Family with which he is associated, the FBI Reports 1-10, 14-24, A-C, 101-03, F1-F6, F8-F14, F17, F20, F23A, F24-F27, F31-F35, F38-F40, F44, F47-F50, F53-57, F59, F61, F63, F65-F66 (Dec. 18, Stewart Decl. at ¶17(a), (b), (d)) and the two Miscellaneous Records are exempt from disclosure (Oct. 2, Stewart Decl. at ¶53).

Exemption 3

Exemption 3 shields information "specifically exempted from disclosure by statute ...., provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. §552(b)(3). Defendants assert that certain wiretap materials, Grand Jury materials and pen register materials were properly withheld from plaintiff because they are protected by statutes that are recognized under Exemption 3.

i. *Title III Materials*

Congress enacted the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"), *see* 18 U.S.C. §§2510-20, to comprehensively and stringently regulate the interception of wire, oral and electronic communications. *Lam Lek Chong v. DEA*, 929 F.2d 729, 732 (D.C.Cir.1991); *see Gelbard v. United States*, 408 U.S. 41, 46, 92 S.Ct. 2357, 2360, 33 L.Ed.2d 179 (1972). Title III has several prominent purposes:

(1) "to prohibit, on the pain of criminal and civil penalties, all interceptions ..., except those specifically provided for ..., most notably those interceptions permitted by law enforcement officers when authorized by court order ..."

United States v. Giordano, 416 U.S. 505, 514, [94 S.Ct. 1820, 1826, 40 L.Ed.2d 341] (1974);

(2) to specify the limited circumstances the fruits of court-authorized interceptions may be sued or disclosed, *Lam Lek Chong v. DEA*, 929 F.2d at 731; and

(3) "to ensure the reliability and integrity of evidence obtained by means of electronic surveillance...." *United States v. Ojeda Rios*, 495 U.S. 257, 263 [110 S.Ct. 1845, 1849, 109 L.Ed.2d 224] (1990).

[12] Title III has been held to fall squarely within the scope of Exemption 3. *Lam Lek Chong*, 929 F.2d at 733; *Docal v. Bennsinger*, 543 F.Supp. 38, 43-44 (M.D.Pa. 1981). In *Lam Lek Chong v. DEA*, the Court of Appeals for the District of Columbia explained that "[o]n its face, Title III clearly identifies intercepted communications as the subject of its disclosure limitation." *Id.* at 733 (citing 18 U.S.C. § 2517). The *Lam Lek Chong* court concluded that Title III was in accordance with subsection (B) of Exemption 3 because Congress manifested a determination that certain specified materials should remain confidential. *Id.* at 733. Section 2517 under Title III allows disclosure only in three circumstances:

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral or electronic communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire, oral, or electronic communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

18 U.S.C. § 2517.

Not only are these records memorializing the interceptions protected, but so are the applications made and the court orders granted for the interceptions. Section 2518(8)(b) provides that applications and orders under Title III shall be sealed by a judge and disclosed only upon a showing of good cause:

> Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

18 U.S.C. §2518(8)(b). Disclosure in violation of Section 2518(8)(b) is punishable by contempt. 18 U.S.C. § (8)(c). The legislative history of Section 2518(8)(b) clearly indicates Congress' desire for confidential treatment of Title III applications and orders:

> Subparagraph (b) provides that applications and orders of authorization shall be treated confidentially. Particularly in renewal situations, they may be expected to contain sensitive information. The provision requires them to be sealed and kept wherever the

> judge directs, which would normally be with the records themselves. Applications and orders may not be disclosed except incidental to the disclosure or use of the records themselves after showing of good cause, for example, under (10(a), discussed below. Applications and orders may not be destroyed except on a court order and must be kept for at least 10 years.

S.Rep. No. 1097 (1968), *reprinted in*, 1968 U.S.C.C.A.N. 2112, 2194.

Interceptions of communications by the FBI pursuant to Title III and pursuant to the order of Judge Harold A. Ackerman (Miscellaneous Doc. Nos. 87-198 and 87-392) are protected by Exemption 3. According to defendants, these interceptions were taken in 1987 and 1988 in New Jersey-Casella's Restaurant, 615 First Street, Hoboken, New Jersey and the Village Coffee Shop, 359 2nd Street, Jersey City, New Jersey. (Oct. 2 Stewart Decl. at ¶55.) The records consist of the recordings of the interceptions, documents transcribing the contents of the interceptions and the applications, which were made at roughly one-month intervals over the course of a year and the orders granting the interceptions. *(Id.)*

The other Title III documents defendants seek to protect are pen register materials. The Electronic Communications Privacy Act under Title III of the

Omnibus Crime Control and Safe Street Act of 1968 generally protects against the unauthorized interception of electronic communications. S.REP. No. 541, 99th Cong. (1986), *reprinted in*, 1986 U.S.C.C.A.N. 3555. However, an exception to this rule is when the interception is permitted by court order and related to a criminal investigation.

Defendants also seek to protect materials from pen registers which are devices that identify phone numbers dialed from a particular phone by recording or decoding electronic or other impulses. *See* 18 U.S.C. §3127(3).[15] Pen registers can only be installed after obtaining a court order. An attorney for the federal government, a state investigative or law enforcement officer permitted by state law may make an application for a pen register. 18 U.S.C. §3122. A court may enter an *ex parte* order authorizing the installation and use of a pen register if a certification is submitted that states that the information sought is relevant to an ongoing criminal investigation. 18 U.S.C. §3123. The order may direct a third party to furnish information, facilities and technical assistance necessary to install the pen register. 18 U.S.C. § 3123(b)(2). Section 3123(d) provides that once ordered, the existence of the pen register cannot be disclosed without the court's permission. Section 3123(d) reads in pertinent part:

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[15] Pen registers only record the telephone numbers dialed, not the actual content of the communications. S.REP. No. 541, 99th Cong. (1986), *reprinted in*, 1986 U.S.C.C.A.N. at 3600.

> (d) **Nondisclosure of existence of pen register** ...-An order authorizing or approving the installation and use of a pen register ... shall direct that
>
> (1) the order be sealed until otherwise ordered by the court; and
>
> (2) the person owning or leasing the line to which the pen register ... is attached, or who has been ordered by the court to provide assistance to the applicant, not disclose the existence of the pen register .... or the existence of the investigation to the listed subscriber, or to any other person, unless or until otherwise ordered by the court.

18 U.S.C. § 3123(d).

The pen register materials defendants seek to withhold are two sealed applications submitted to the court for the installation and used of pen registers on a Jersey City, New Jersey phone line.[16] (Oct. 2,

[16] Plaintiff states that an illegal electronic surveillance was conducted at his residence in New York. (Oct. 17, 1992 Manna Decl. at ¶8; Dec. 24, 1992 Manna Decl. at ¶5.) However, the materials defendants seek to protect are for surveillance conducted in New Jersey (*See* Oct. 2, 1992 Stewart Aff. at ¶51, 55, 57.) Plaintiff provides no explanation why an alleged illegal electronic surveillance in New York has any bearing on the disclosure of materials concerning New Jersey surveillance.

1992 Stewart Decl. at ¶57.) The other two documents are two orders issued by the Magistrate Judge who granted the applications. *(Id.)* All four documents are protected by Section 3123(d) and Exemption 3 under FOIA.

ii. *Grand Jury Materials*

[13] Like Title III, Rule 6(e) of the Federal Rules of Criminal Procedure is a recognized statute under Exemption 3. *See, e.g., Garside v. Webster*, 733 F.Supp. 1142, 1147 (S.D.Ohio 1989); *Fund for Constitutional Government v. National Archives & Records Serv.*, 656 F.2d 856, 867-68 (D.C.Cir.1981). Rule 6(e) states in pertinent part:

> (2) General Rule of Secrecy. -A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist, who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision [*i.e.*, government personnel assisting the attorney in the performance of such government attorney's duties] shall not disclose matters occurring before the grand jury....

Fed.R.Crim.P. 6(e)(2). Courts have recognized that releasing grand jury investigatory information may discourage full discussion, conscientious voting and participation among the jurors. *Matter of Wade*, 969

F.2d 241, 246 (7th Cir.1992). Therefore the need for secrecy does not end with the investigation. *Id.*

Although disclosure of matters occurring before the grand jury is the exception and not the rule. *Fund For Constitutional Gov.*, 656 F.2d at 868, "there is no *per se* rule against disclosure of any and all information which has reached the grand jury chambers...." *Senate of Com. of Puerto Rico on Behalf of Judiciary Committee v. U.S. Dep't of Justice*, 823 F.2d 574, 582 (D.C.Cir. 1987). "[T]he touchstone is whether disclosure would 'tend to reveal some secret aspect of the grand jury's investigation' and such matters as 'the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, the deliberations or question of jurors, and the like'." *Id.* (quoting Memorandum Opinion, C.A. No. 84-1829, at 5 (D.D.C. Feb. 7, 1986)). For example, documents subpoenaed by a grand jury may not be exempt if they are created for purposes independent and unrelated to the grand jury investigation. *See SEC v. Dresser Indus., Inc.*, 628 F.2d 1368 (D.C.Cir.*) (en banc), cert. denied*, 449 U.S. 993, 101 S.Ct. 529, 66 L.Ed.2d 289 (1980).

Rule 6(e) sets forth the circumstances and conditions under which Grand Jury information may be disclosed. *Id.; see* S.Rep. No. 354, 95th Cong. 1st Sess. 7-8 (1977). "Any disclosure to persons outside of the government may only be made

pursuant to a court order." *Id.* (citing Fed.R.Crim. P.6(e)(3)(C)).

The Grand Jury Materials that defendants seek to protect consist of transcripts of proceedings before federal grand juries, documents setting forth the names of actual or potential witnesses, and documents describing matters before the grand jury. (Oct. 2, Stewart Decl. at ¶56.) Defendants claim that none of the matters sought to be withheld is an exhibit prepared independently of the grand jury process. Based on Rule 6(e), the transcripts, the names of actual or potential witness and the description of the documents "describing matters before the grand jury" are protected. Therefore, Exemption 3 applies here and summary judgment is granted with respect to these documents. *See Senate of Puerto Rico,* 823 F.2d at 582; *Matter of Wade,* 969 F.2d at 246 (transcripts of witness "testimony before the grand jury [are] exactly the documents protected by ... exception [3]").

[14] The Stewart Declaration states that the two entries were turned over to defense counsel during plaintiff's trial as *Jencks* material. Indeed, Mr. Stewart concedes that plaintiff may already have a copy. (Oct. 2, Stewart Decl. ¶47.) Plaintiff argues that since he was entitled to a copy during trial, these documents are not protected by a FOIA exception. (Louis Anthony Manna Declaration filed October 22, 1992 at ¶¶4-5.) In *Garside v. Webster,*

733 F.Supp. 1142 (S.D.Ohio 1989), the court expressly rejected this argument by writing:

> [T]he fact that ... [Grand Jury] material was made available to the plaintiff at his criminal trial is irrelevant because under FOIA, the right of th[e] plaintiff to receive requested information under 5 U.S.C. §552 is as a member of the general public, no more, no less.

733 F.Supp. at 1147. Disclosure of information during the course of a criminal proceedings does not constitute a waiver of a FOIA exemption. *Id., Irons v. FBI,* 880 F.2d 1446, 1452 (1st Cir. 1989); *Erb v. Department of Justice,* 572 F.Supp. 954, 956 (W.D.Mich.1983). Based on *Garside* and other established case law, plaintiff's request is denied.

Exemption 5

Exemption 5 allows the withholding of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). This exemption prevents the public from having documents "which a private party could not discover in litigation with the agency.' " *Conoco Inc. v. United States Dep't of Justice,* 687 F.2d 724, 727 (3d Cir.1982) (quoting *NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 148, 95 S.Ct. 1504, 1515, 44 L.Ed.2d 29 (1975)). Exemption 5 as

been interpreted as preserving privileges such as the attorney-client privilege, the attorney work-product privilege and the deliberative process privilege, also referred to as the executive privilege. *Schell v. U.S. Dep't of Health & Human Servs.*, 843 F.2d 933, 939 (6th Cir.1988). The government claims that all three privileges are at issue in the present case.

i. *Attorney-Client Privilege*

[15, 16] It is well settled that the attorney-client privilege protects confidential communications. *U.S. v. Zolin*, 491 U.S. 554, 562, 109 S.Ct. 2619, 2625-26, 105 L.Ed.2d 469 (1989). "The privilege extends to verbal statements, documents and tangible objects conveyed by both individual and corporate clients to an attorney in confidence for the purpose of any legal advice." *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 90 (3d Cir.1992) (citing 8 John H. Wigmore, *Evidence* § 2292 (John T. McNaughton rev.ed. 1961)); *accord United States v. Rockwell Int'l*, 897 F.2d 1255, 1264 (3d Cir.1990). The primary purpose of the privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of the law and administration of justice." *Haines*, 975 F.2d at 90 (quoting *Upjohn Co. v. U.S.*, 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981)); *Fisher v. United States*, 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976). To achieve this result, the client must feel free to make full disclosure to

an attorney of prior wrongdoings, in order for the attorney to adequately represent him or her. *Haines*, 975 F.2d at 90. Since the privilege has the effects of withholding relevant factual information, it is narrowly applied. *Fisher v. United States*, 425 U.S. at 403, 96 S.Ct. at 1577. "The privilege does not apply to communications that are intended to be disclosed to third parties or that in fact are so disclosed." *Rockwell*, 897 F.2d at 1265. A disclosure of any meaningful part of the purported privileged communication can waive the privilege with respect to the whole. *Id.*

ii. *Work-Product Doctrine*

[17-19] The work-product doctrine is designed to protect materials prepared by an attorney acting for his client in anticipation of litigation. *Rockwell*, 897 F.2d at 1265. For the doctrine to apply, the material must be prepared in anticipation of litigation and not " 'in the ordinary course of business, or pursuant to public requirements unrelated to litigation.' " *Id.* at 1265-66 (citing *United States v. El Paso*, 682 F.2d 530, 542 (5th Cir.1982), *cert. denied*, 466 U.S. 944, 104 S.Ct. 1927, 80 L.Ed.2d 473 (1984)). In the Third Circuit, a court must determine whether " 'in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation'." *Rockwell*, 897 F.2d at 1266 (quoting *In re Grand Jury Proceedings*, 604 F.2d 798, 803 (3d

Cir. 1979)). Under the FOIA's Exemption 5, "[t]he work product privilege simply does not distinguish between factual and deliberative material." *Martin v. Office of Special Counsel, Merit Sys. Protection Bd.*, 819 F.2d 1181, 1187 (D.C.Cir.1987); *accord United Technologies Corp. v. N.L.R.B.*, 632 F.Supp. 776, 781 (D.Conn.1985) Therefore, factual work-product materials are immune from disclosure. *Id.* Lastly, the termination of litigation does not vitiate the protection afforded by the work-product doctrine under Exemption 5. *Federal Trade Comm'n v. Grolier, Inc.*, 462 U.S. 19, 28, 103 S.Ct. 2209, 2215, 76 L.Ed2d 387, 395 (1983).

iii. *Deliberative Privilege*

[20] The primary purpose of the deliberative process privilege is to encourage candid communications between subordinates and superiors. *Schell v. U.S. Dep't of Health & Human Servs*, 843 F.2d 933, 939 (6th Cir. 1988). The ultimate goal of Exemption 5 is to prevent the quality of agency decision making from deteriorating as a result of public exposure. *Id.; see* H.R.Rep. No. 1497, 89th Cong., 2d Sess. 10, *reprinted in* 1966 U.S.C.C.A.N. 2418, 2427-28; *see also* S.Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

[21] "To come within Exemption 5, a government document must be both 'predecisional' and 'deliberative'." *Schell*, 843 F.2d at 940. A document is "predecisional" when it is received by the decision maker on the subject of the decision

prior to the time the decision is made. *Id.* An Exemption 5 document does not automatically lose its predecisional character when a final decision is made. *See May v. Department of Air Force*, 777 F.2d 1012, 1014-15 (5th Cir.1985), *reh'g denied*, 800 F.2d 1402 (5th Cir.1986); *Cuccaro v. Secretary of Labor*, 770 F.2d 355, 358 (3d Cir.1985). In determining whether a document is predecisional, an agency does not necessarily have to point specifically to a final decision, but merely establish "what deliberative process is involved, and the role played by the documents in issue in the course of that process." *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 868 (D.C.Cir.1980). The Supreme Court has stated:

> Our emphasis on the need to protect the *pre-decisional* documents does no mean that the existence of the privilege turns on the ability of an agency to identify a specific decision in connection with which a memorandum is prepared. Agencies are, and properly should be engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions and the lower courts should be wary of interfering with this process.

NLRB v. Sears, Roebuck & Co., 421 U.S. at 151 n. 18, 95 S.Ct. at 1517 n. 18 (emphasis in original).

A document is " 'deliberative' when it reflects the give-and-take of the consultative process." *Schell*, 843 F.2d at 940. Courts have found that Exemption 5 applies to "recommendations, draft documents, proposals, suggestions and other subjective documents which reflect the personal opinions of the writer rather the policy of the agency." *Id.; see NLRB v. Sears Roebuck & Co.*, 421 U.S. at 150, 95 S.Ct. at 1516 (deliberative process privilege protects "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.").

[22] Unlike the work-product privilege, the deliberative privilege does not apply to purely factual investigative material, unless such factual material is selected or interpreted or otherwise so inextricably intertwined with the subjective opinion. *E.P.A. v. Mink*, 410 U.S. 73, 89-92, 93 S.Ct. 827, 837-38, 35 L.Ed.2d 119 (1973); *LSB Indus., Inc. v. Commissioner of Internal Revenue*, 556 F.Supp. 40, 45 (W.D.Okl.1982).

[23] Summary judgment is granted in the government's favor to protect the documents in paragraph 58 of the October 2, 1992 Stewart Declaration because they are protected by the work-product privilege. These documents include legal research, trial note books, intra-agency memoranda, analyses, charts, tables, drafts of court-filings and notes prepared by the Justice Department attorneys. Similarly, the draft of an affidavit which in its final

version accompanied an application for various search warrants that were filed under seal is also protected.

Defendants assert that certain internal Department of Justice memoranda (hereinafter the "Justice Memoranda") were prepared by Justice Department attorneys in connection with litigation supervision. (Dec. 18, 1992 Stewart Decl. at ¶¶20-21.) Most of these documents were done in preparation for plaintiff's prosecution in *United States v. Manna*, Crim. No. 88-239. (*See Id.* at ¶20(b-f).) These documents, including the document in paragraph 20(a) which contains discussions of the legal strengths and weaknesses of the *Manna* prosecution, are protected by the attorney work-product privilege. In addition, the report dated October 12, 1966 (Dec. 18, Stewart Decl. at ¶22), the worksheets prepared for the indictment and prosecution (*Id.* at ¶23), and the draft affidavits also prepared by the attorneys *(Id.* at ¶25) are protected by the work-product doctrine.

The Justice Memoranda described in the December 18, 1992 Stewart Declaration at paragraph 20(b) are protected by the deliberative privilege because these documents were prepared in order to obtain authorization for the original and superseding indictments in *United States v. Manna*, Crim. No. 88-239. These memoranda are also protected by Exemption 3 because they contain extensive

transcriptions and analyses of Title III interceptions, as well as grand jury material.

The draft affidavits are also protected by the deliberative privilege because they were prepared in anticipation of an application for an order authorizing the interception of oral communications at Casella's Restaurant in Hoboken, New Jersey. (Dec. 18, 1992, Stewart Decl. at ¶25(a).) These affidavits are deliberative in nature because they were drafted for review and approval by the supervisor of the Organized Crime and Racketeering section in Washington. (*Id.* at ¶26.)

The fifteen Case Initiation Reports ("CIRs") and their drafts as described in the December 18, 1992 Stewart Declaration in Paragraphs 27-30 are protected from disclosure by the deliberative privilege, attorney-client privilege and work-product privilege. (Dec. 18, Stewart Decl. at ¶¶27-28). A CIR describes, among other things, the subject of the proposed investigative action, the charges contemplated, a summary of known facts, the organized crime connection of the suspects, the basis establishing that connection and the prosecutors' objective. CIRs are prepared by Strike Force attorneys in order to receive proper authorization to proceed with the recommended investigative action.

In addition, the "dailys" which are internal reports prepared by field attorneys to the Organized Crime and Racketeering Section in Washington are

protected by the deliberative process and the work-product doctrine because they report significant events concerning the course of each prosecution i.e. relevant informant information. (Dec. 18, Stewart Decl. at ¶28.) Lastly, the miscellaneous materials described in paragraph 31(a) and (c) in the December 18, 1992 Stewart Declaration are protected by the work-product privilege and the materials described in paragraph 31(b) is protected by the attorney-client privilege.

B. VAUGHN INDEX

[24] Plaintiff requests an index in accordance with *Vaughn v. Rosen*, 484 F.2d 820 (the "*Vaughn* index"). A *Vaughn* index is an itemized list compiled by the governmental agency which cross-references each withheld document (or portion) with a specific FOIA exemption and the relevant portion of the agency's nondisclosure justification. *Vaughn*, 484 F.2d at 827. There is no set formula for a *Vaughn* index; federal courts have explained that it is the function, no the form, which is important. *See, e.g., Hinton v. Department of Justice*, 844 F.2d 126, 128 (3d Cir.1988). A *Vaughn* index is a reasonable alternative to having the court perform an *in camera* review which may impose a significant burden on the court. *Hinton*, 844 F.2d at 128. The Third Circuit has stated that "[a]ll that is required ... is that the requester and the trial judge be able to derive from the index a lear explanation of why each document or portion of a document withheld is

putatively exempt from disclosure." *Id.* at 129. The Third Circuit has further explained,

> [U]nder ordinary circumstances a *Vaughn* index ... will generally suffice to narrow the disputed issues and permit a reasoned disposition by the district court.... In both the ordinary and the exceptional case, *in camera* affidavits and submissions are authorized and the district court may resort to them in arriving at its ultimate determination. In both instances, the district court must have furnished to it, in whatever form, public or private, all of the detailed justifications advanced by the government for non-disclosure. The government must also give the court an opportunity to review all the materials which the government claims to be exempt, even though the decision whether to inspect these materials rests with the district court.

Id. (quoting *Lame v. United States Dep't of Justice*, 654 F.2d 917, 922 (3d Cir.1981)).

Courts have generally accepted the used of "coded" indices - in which agencies break certain FOIA exemptions into several categories, explain the particular nondisclosure rationales for each category, and then correlate the exemption and category to the particular documents at issue. *See, e.g., Keys v. Department of Justice*, 830 F.2d 337, 349 (D.C.Cir.1987); *Albuquerque Publishing Co. v.*

Department of Justice, 726 F.Supp. 851, 859 (D.C.C.1989).

[25, 26] A district court has discretion to accept sufficiently detailed affidavits from the government in lieu of an index. *Currie v. I.R.S.*, 704 F.2d 523 (11th Cir.1983). "Without evidence of bad faith, the veracity of the government's submission regarding reasons for withholding the documents should not be questioned." *Matter of Wade*, 969 F.2d 241, 246 (7th Cir.1992) (citing *Silets v. United States Dep't of Justice*, 945 F.2d 227 (7th Cir.1991) (*en banc*) *cert. denied*, __ U.S.__, 112 S.Ct. 2991, 120 L.Ed.2d 868 (1992). The affidavits provided here are sufficiently detailed such that a *Vaughn* index is not warranted. Moreover, plaintiff's request for a *Vaughn* index must be denied because submission of a detailed *Vaughn* index may present the same risks that production of the underlying documents presents. See *Manna v. Department of Justice*, Civ. No. 92-1840, slip op. at p. 3 (citing *Lewis v. IRS*, 823 F.2d 375, 380 (9th Cir.1987)). Accordingly, plaintiff's motion for a *Vaughn* index is denied.

Summary judgment is granted with respect to all the documents defendants seek to withhold except with respect to the documents in the Turner Declaration. Defendants are invited to reapply for protection of these documents with their future motion for summary judgment with respect to any

documents discovered subsequent to defendants' application now before the court.

C. ADEQUACY OF SEARCH

[27] Plaintiff challenges the adequacy of the searches performed by agency officials in response to this FOIA request. "[A]n agency responding to a FOIA request must 'conduct[] a search reasonably calculated to uncover all relevant documents' ". *Truitt v. Department of State,* 897 F.2d 540, 542 (D.C.Cir.1990) (quoting *Weisberg v. U.S. Dep't of Justice,* 227 U.S.App.D.C. 253, 260, 705 F.2d 1344, 1351 (D.C.Cir.1983)). " 'The issue is *not* whether any further documents might conceivably exist but whether the government's search for responsive documents was adequate.' " *Id.* (emphasis in original). An agency "must demonstrate 'beyond material doubt' that the search was reasonable." *Truitt,* 897 F.2d at 542.

[28] When determining whether an agency's FOIA search was reasonable, courts may rely on agency affidavits, provided that the affidavits are relatively detailed, nonconclusory and submitted in good faith. *Perry v. Block,* 684 F.2d 121, 126 (D.C.Cir.1982). The affidavits of the responding agency need not set forth with meticulous documentation the details of an epic search for the requested records. *Id.* at 127. "Rather, in the absence of countervailing evidence or apparent inconsistency of proof, affidavits that explain in reasonable detail

the scope and method of the search conducted by the agency will suffice to demonstrate compliance with the obligations imposed by the FOIA." *Id.* When determining whether the search has been adequate, "a reviewing court must thus determine whether the materials submitted by the agency satisfactorily demonstrate the apparent adequacy of the search conducted." *Id.* Only when the agency's responses "raise serious doubts as to the completeness of the search or are for some other reason unsatisfactory" will granting summary judgment in the agency's favor usually be inappropriate. *Id.; accord Truitt,* 897 F.2d at 542.

[29] The Declarations of Evelyn Block fully set forth the scope and methodology of defendants' search. (*See* Nov. 19, 1992, Dec. 18, 1992 Declarations of Evelyn F. Block.) First a computer search was done on a tracking system entitled "PROMIS" (An acronym for *P*rosecutor's *M*anagement *I*nformation *S*ystem). The declarations provide the search terms used and the results found. (Nov. 19, 1992 Block Decl. at ¶¶9-13.). In addition, the Block Declarations explain the types of files found and the follow-up procedures employed. (Dec. 18, 1992 Block Decl. at ¶12; Feb. 1, 1993 Block Decl. at ¶2.) Defendants also searched three other indices which were non-computerized and in the form of "index cards." (Nov. 19, 1992 Block Decl. at ¶¶14-15; Dec. 18, 1992 Block Decl. at ¶4.) District courts have held that FOIA responsibilities can be satisfied by searching general indices maintained on index cards.

See, e.g., Friedman v. F.B.I., 605 F.Supp. 306, 310-11 (N.D.Ga.1981); *Stern v. United States*, No. 77-3812-C (D.Mass. Aug. 25, 1980). The Block Declarations expound on what was found using these indices and any follow-up that was performed. (Nov. 19, 1992 Block Decl. at ¶¶14-16; Dec. 18, 1992 Block Decl. at ¶¶4-6; Feb. 1, 1993 Block Decl. at ¶¶3-5). Defendants are in the process of completing their search and anticipate submitting a motion for summary judgment with respect to any documents found subsequent to the motion now before the court.

Although defendants concede that they have not completed their search in response to plaintiff's FOIA request, (Dec. 18, at ¶6), the defendants have met their burden by demonstrating beyond a material doubt that the search methodology employed was reasonable. The declarations of Virginia L. Wright details how plaintiff's FOIA request has been handled since its inception. (*See* Oct. 1, 1992 and Dec. 17, 1992 Declarations of Virginia L. Wright.) The Wright Declarations proved the FOIA search results, a chronology of their correspondence between plaintiff and defendant and a copy of the correspondence. The Wright Declarations also state that plaintiff was informed that by paying a duplication fee he could obtain a copy of the non-privilege material the agency had on file. Hence, defendants' search was responsive and adequate under the FOIA.

CONCLUSION

Defendants' motion for partial summary judgment is granted in its entirety except with respect to the information described in the Turner Declaration. Defendants may resubmit their application regarding this information as directed within this opinion. Plaintiff's cross-motion for summary judgment is denied and plaintiff's cross-motion for a *Vaughn* index is also denied.

Appendix C - Decision of the United States Court of Appeals for the Third Circuit, on Rehearing, Denied June 6, 1995 [Pages 86a - 87a]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-5662

LOUIS ANTHONY MANNA,

Appellant

v.

UNITED STATES DEPARTMENT OF JUSTICE; UNITED STATES ATTORNEY - DISTRICT OF NEW JERSEY,

Appellees

Appeal from the United States District Court for the District of New Jersey (D.C. Civil Action No. 92-cv-01840)

PRESENT: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE and SAROKIN, Circuit Judges, and JOYNER, District Judge*

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* Hon. J. Curtis Joyner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation. Judge Joyner was limited to voting for panel rehearing.

This petition for rehearing filed by appellant in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service and no Judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

_____
Circuit Judge

DATED: JUN 6, 1995

Appendix D - Letter Opinion of the United States District Court for the District of New Jersey, Filed August 25, 1993 [Pages 88a - 114a]

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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LETTER OPINION
NOT FOR PUBLICATION

Re: Manna v. U.S. Dept. of Justice (92-1840)

Dear Sirs:

As the parties are well aware, this case stems from plaintiff Louis A. Manna's request for documents from the government pursuant to the

Freedom of Information Act, 5 U.S.C. §552 ("FOIA"). In March of this year, I granted most of the United States Department of Justice's (the "Justice Department") and the United States Attorney for the District of New Jersey's (collectively referred to as "defendants" or the "government") motion for summary judgment holding that they were not required to disclose certain documents or particular information contained therein. At the same time, I denied plaintiff's cross-motion for summary judgment and request for a *Vaughn* index. *See Manna v. U.S. Dep't of Justice*, 815 F.Supp. 798 (D.N.J. 1993).

Defendants bring another summary judgment motion with respect to additional documents discovered since the March Opinion was issued and with respect to the documents I previously denied granting summary judgment on because of insufficient supporting affidavits. Plaintiff again cross-moves for summary judgment.

For the reasons provided below, defendant's motion for summary judgment is granted and plaintiff's motion for summary judgment is denied.

There is no need to reiterate the entire summary of facts, procedural history and underlying law in this case because all of this information is discussed at length in my March Opinion. Therefore, I will only discuss the basic law, the documents being considered, whether the documents are shielded

or not shielded by an Exemption and the rationale for my decision.

Defendants assert that the documents should be withheld from plaintiff because the are exempt by FOIA Exemptions 3, 5, 6, 7(A), 7(C), 7(D) and/or 7(F). Plaintiff objects to defendants' reliance on two FOIA Exemptions not asserted in March--Exemptions 6 and 7(D).[1] *See Manna v. Dep't of Justice*, 815 F.Supp. at 804 (only Exemptions 3, 5, 7(A), 7(C) & 7(F) asserted). Since, plaintiff's objection has no legal basis, defendants are not precluded from asserting these two new Exemptions.

Exemption 3

Exemption 3 shields information "specifically exempted from disclosure by statute . . ., provided that such statue (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3).

On October 13, 1992, the Executive Office for United States Attorneys ("EOUSA") referred seven FBI documents consisting of 12 pages to the FBI

[1] Plaintiff mistakenly writes that the new Exemptions asserted are Exemptions 6 and 7(F).

for review and direct response to plaintiff.[2] (June 24, 1993 Michael D. Turner Decl. at ¶5.) By letter dated October 21, 1992 the FBI released all 12 pages to plaintiff with some portions excised. (Id.) A declaration was submitted on December 16, 1992 to justify these withholdings; however, I found the declaration to be insufficient and ordered the government to provide supplemental information. (Id.) Two of the documents that the government resubmits are FBI laboratory reports which reflect analysis of audio- tapes created as the result of Title III telephone interceptions described in paragraph 55 of the October 2, 1992 Declaration of Robert C. Stewart. (Id.) The government has released these documents to plaintiff without the FBI's analysis of the audio tapes and the names of the people identified conversing on the tapes. I agree with the government that Exemption 3 protects these excisions and therefore the government's summary judgment motion is granted and plaintiff's motion is denied with respect to these two analysis reports.

Plaintiff claims that there is "no justification for withholding FBI laboratory reports which reflect analysis of audio tapes . . [because] this information would be in the realm of *Brady* material which is

[2] Plaintiff does not object to the excision in document 3 as described in paragraph 6 on page 5 of the Michael D. Turner June 24, 1993 Declaration; therefore, defendants' motion for summary judgment will be granted with respect to this document. (See Pl. July 4, 1993 Ltr. Br. at p. 4.)

not protected by the FOIA in the Third Circuit." (Pl. July 4, 1993 Ltr. Br. at p. 3) (citing *Ferri v. Bell*, 645 F.2d 1213, 1217-18 (3d Cir. 1981), *modified*, 671 F.2d 679 (3rd Cir. 1982.) Under *Brady v. Maryland*, 373 U.S. 83 (1963), a criminal defendant may seek a new trial if the prosecution fails to inform him of information creating a reasonable doubt as to his guilt that might no otherwise arise. Plaintiff has provided no specifics of how the FBI's analysis report will substantiate a *Brady* attack. Without further explanation, I am unable to conclude like the trial court in *Ferri v. Bell* that plaintiff's claim is legitimate and, hence, warrants disclosure. See *Ferri v. Bell*, 645 F.2d at 1218.

Exemption 6

The FOIA's Exemption 6 provides for non-disclosure of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; . . ." Exemption 6 is similar to Exemption 7(C) in that both protect against invasions of privacy and both require a balancing of privacy interests against public interests. However there are two distinctions that can be made between two. First, Exemption 6 has a more stringent standard requiring that the disclosure must clearly cause an unwarranted invasion of personal privacy, 5 U.S.C. §552(b)(6), whereas Exemption 7(C) only requires that it "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. §552(b)(7)(C);

see U.S. Dep't of State v. Ray, 112 S.Ct. 541, 546 (1991). Second, Exemption 6 reaches a broader scope of documents because unlike Exemption 7(C) it is not limited to documents compiled for law enforcement purposes. However, Exemption 7(C) contains broader privacy language. *See United State Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 756 (1989). In order to prevail, the government must show that, on balance, the plaintiff's asserted public interest in disclosure does not outweigh the personal privacy interest of the individual who is the subject of the file. *Department of the Air Force v. Rose*, 425 U.S. 352 (1976).

The government argues that the two pages of additional records that originated from the Criminal Division fall within the category "similar files" protected by Exemption 6. These documents are described as follows:

a. A one-page memorandum dated January 9, 1970, from the head of the Newark Strike Force to another federal agency regarding a relocated witness (the "Relocated Witness Memorandum"); and

b. A one-page index record relating to FBI 204 Reports, was released with deletions of the identities of two low-level Strike Force employees (the "Strike Force Employees" Memorandum).

(*See* June 24, 1993 Virginia Wright Aff. at ¶ 8.)

In *Department of State v. Washington Post Co.*, 456 U.S. 595 (1982), the Supreme Court construed Congress' intent regarding the phrase "similar files" in Exemption 6 "to have a broad, rather than a narrow, meaning." Id. at 600. The Court noted that Congress sought to achieve " '[t]he protection of an individual's right of privacy' . . . by preventing 'the disclosure of [information] which might harm the individual . . . .' " *Id.* at 601 (quoting H.R. Rep. No. 1497, 89th Cong. 2nd Sess., 11 (1966)).

Based on the Supreme Court's language in *Washington Post Co.*, the entire Relocated Witness Memorandum is protected by Exemption 6 in order to protect the privacy and safety of the witness and the witness' family. The witness and family members were relocated following the witness' cooperation with federal law enforcement authorities against organized crime, specifically the LCN. The purpose of the relocation was to avoid retaliation by organized crime participants. The entire document must be withheld because there are no reasonably segregable portions of information that can be disclosed in the record.

Plaintiff objects to the withholding of the relocated witness' name under Exemption 6 on the grounds that the government has not shown that he

or she is still alive. In support of his argument, plaintiff cites *Diamond v. Federal Bureau of Investigation*, 532 F.Supp. 216, 227 (S.D.N.Y. 1981), *aff'd* 707 F.2d 75 (2d Cir. 1983), *cert. denied*, 465 U.S. 1004 (1984), where the court required the government to ascertain whether the interviewee's privacy interest was still at issue due to the extraordinary age (approximately 30 or more years old) of the documents at issue. *See id.* at 226. The court stated that the government could be ordered to search its existing files on third parties to determine if they were still living or if they had expressed a desire that their involvement be disclosed. *Id.* at 227. The court noted that the government was not obligated to track down all its sources and interview them about releasing their names and involvement because such a process would be unduly burdensome. *Id.* at 226. Other courts have also required an additional showing by the government for protecting the privacy of sources when the documents were old. *See, e.g. Schmerler v. F.B.I.*, 696 F.Supp. 717, 720-21 (D.D.C. 1988) (documents were 50 years old); *Ferguson v. F.B.I.*, 762 F.Supp 1082, 1098 (S.D.N.U. 1991) (documents were decades old); *see also Fitzgibbon v. C.I.A.*, 578 F.Supp. 704, 720 (D.D.C. 1983) (Executive Order relevant to decision established a presumption that documents were declassified after 20 years).

Plaintiff argues that since the Relocated Witness Memorandum is dated 1970 the relocated witness my be dead. (*See* June 24, 1993 Wright

Decl. at ¶ 8(a)). The government concedes that the death of a source has a bearing on whether a source has a valid privacy interest. As a result, the government has submitted an declaration from Evelyn Bock declaring that she has conducted a search of the records of the United States Attorney's Office to determine whether any records indicate that the relocated witness or the witness' family have died. (*See* August 10 1993 Evelyn F. Bock Decl.) Ms. Bock utilized the computerized PROMIS system, the index cards generated by the PROMISE system when it is periodically purged of closed cases and the manual index card generated prior to the PROMIS system in the United States Attorney's Office. (*Id.* at ¶ 5.) In addition she searched the index cards of the intelligence files maintained by the Organized Crime Strike Force Division of the United States Attorney's Office. (*Id.)* Based on that search, Ms. Bock concluded that the United States Attorney's Office has no records indicating that the relocated witness or witness' family has died. *(Id.)*

I find that the government's search meets its obligation under *Diamond* to search its existing files and, at this juncture, the government is not required to do any more. Plaintiff may strengthen his case by presenting independent highly reliable documentation, *e.g.* official death certificates, obituaries, that the person on whose behalf information is being withheld for privacy reasons has died. If he is able to present such evidence, the burden will shift back to the government to refute

the information or show that it is nonetheless in the public interest to continue to withhold that information. In the meantime, the government's summary judgment is granted with respect to the Relocated Witness Memorandum.

With respect to the Strike Force Employees Memorandum, the names of the low Strike Force personnel contained in this document are also protected by Exemption 6. U.S. Attorney/Strike Force personnel come in contact with, and handle, information regarding violations of federal criminal statutes. (June 24, 1993 Wright Aff. at ¶ 15.) The government rightfully withheld the two names in the memorandum to protect those persons from being identified and contacted by suspects, targets or other individuals attempting to gain access to information about the federal law enforcement investigations. (See id.) The government anticipated that a release of these names could also expose them to publicity or other adverse attention stemming from their involvement. Therefore, the government rightfully released this one page document to plaintiff with those names excised.

As stated above, the privacy interest of the source must be weighted against the public interest, if any is asserted by the requester. Plaintiff argues that his "genuine public interest" is disclosing the government's conspiracy to convict him, an innocent man, without due process of law. (Pl. July 4, 1993 Br. at p. 3) According to plaintiff, he needs the

documents to prove that there was a great deal of government misconduct--prosecutorial misconduct, as well as misconduct on the part of agents who investigated plaintiff's criminal case.

As I explained in my previous Letter Opinion dated April 21, 1993, plaintiff has presented no evidence to date that shows that there has been any misconduct on the part of the government that would support plaintiff's allegations. *Manna v. Dep't of Justice*, 92-1840, slip. op. at 5 (D.N.J. Apr. 21, 1993)(citing *Landano v. U.S. Dep't of Justice*, 956 F.2d 422, 431 (3d Cir. 1992), *rev'd on other grounds*, 124 L.Ed.2d 84 (1993)). Although plaintiff contends that the misconduct of government employees have come to light since his conviction, he has yet to explain what that evidence is. The only specific allegation of misconduct plaintiff asserts is that the government utilized information gleaned from the illegal electronic surveillance in the Southern District of New York and labeled it a confidential source in order to obtain Title III orders in the District of New Jersey. Plaintiff claims that the Government never revealed to the judge who issued the Title III order of the illegal confidential source. Plaintiff asserts that he has instituted a lawsuit entitled *Manna v. City of New York*, Civ. Ac. No. 92-8013 (S.D.N.Y. 1992) to pursue his claim that the electronic surveillance in New York was illegal. Again, plaintiff has not provided any facts supporting his conclusion that the New York electronic surveillance was illegal and that the Title

III orders in New Jersey were based on the fruits of this alleged illegal surveillance. Plaintiff merely asserts the legal proposition that the government cannot protect records which were obtained through warrantless electronic surveillance.

Until plaintiff is able to make some showing to support his conclusions, I have no other choice but to deny his request for disclosure and find that he has failed to offer any legitimate public interest. Should plaintiff succeed in his lawsuit in the Southern District of New York or discover evidence from that case that will support his position here, plaintiff my then be able to assert a cognizable public interest.

Exemption 7(A)

Exemption 7(A) protects disclosure of information compiled for law enforcement purposes when it "could reasonably be expected to interfere with enforcement proceedings . . ." 5 U.S.C. §552(b)(7)(A). I find that the following documents are protected by Exemption 7(A):

a. An affidavit filed in the District Court (92-3299-01 (SRC)) on December 18, 1992 in support of an application by the United States for search and seizure warrants. These warrants were issued and all supporting documents, including affidavits, have been sealed by the Court

because the investigation is continuing. (June 25, 1993 Robert C. Stewart Decl. at ¶¶ 4, 6.)[3]

b. Five FBI 204 Reports, numbered F67 through F71 are protected under Exemption 7(A). FBI 204 periodic reports described and analyze the Genovese LCN Family and related law enforcement investigations. (June 25, 1993 Stewart Decl. at ¶¶ 4, 7.) These documents are similar to other FBI 204 Reports which I held in *Manna*, 815 F.Supp. at 807, were protected by Exemption 7(A). (see category m. on page 807 of the Opinion). Documents F67-F71 contain information relating to informants, F68-F69 contain information on unsolved

[3] Indeed, the potential sensitivity with respect to search warrants is illustrated by the recent (5-17-93) gangland-style murder of Vincent Randazzo. (June 25, 1993 Stewart Aff. at ¶ n.l.) The killers left on the body a copy of a federal warrant and inventory relating to Randazzo's gambling and loansharking operation in Newark. (Id.) This strongly suggested that the reason for the murder was related to the federal search directly against the gambling and loansharking operation. (Id.) The U.S. Attorney's office states that, without the benefit of any insider information, there was nothing written in the warrant or contained in the inventory which would explain the raionale for the LCN family's death order. (Id.) One of Randazzo's closest lifetime associates is under arrest for allegedly being one of three men who shot Randazzo to death in a motel parking lot crowded with bystanders. (Id.)

homicides or violent crimes and document F71 contains surveillance information identifying accomplices and other investigative information. (June 25, 1993 Stewart Decl. at ¶ 7; see December 18, 1992 Robert C. Stewart Aff. at ¶ 17.)

c. An FBI memorandum from the late 1970's concerning 21 homicides believed to have been carried out by certain members and associates of the New Jersey faction of the Genovese LCN family. (June 25, 1993 Stewart Decl. at ¶¶ 4, 8.) Robert C. Stewart, an Assistant U.S. Attorney, affirms that 7 of these murders are unsolved (Id. at ¶ 8) and, to the best of his knowledge, non of these have been prosecuted to date. He further believes that some of the suspects are still living and have risen within the organized crime community. As a result, they are currently under investigation and could be prosecuted in a historical RICO case should other evidence develop. (Id.)

Exemption 7(C)

Exemption 7(C) prevents information compiled for law enforcement purposes from being disclosed when it "could reasonably be expected to constitute an unwarranted invasion of personal privacy . . ." 5

U.S.C. §552 7(C). As a result, I hold that the following records are protected by Exemption 7(C).

a. The entire Relocated Witness Memorandum and the names of the two low level employees stated in the Strike Force Employees Memorandum as provided in paragraph eight of June 24, 1993 Wright Affidavit.

b. Documents described in categories a, b, c under Exemption 7(A) above.

c. The two FBI reports described above under Exemption 3. (*See* June 24, 1993 Turner Aff. at ¶ 5.)

d. Four FBI documents which are the recorded interviews by FBI agents of different individuals named on the face of the documents. (June 24, 1993 Turner Aff. at ¶ 5.)

e. Documents 4-8, 9-13 (first pages of FBI 204 Reports) as described in paragraph 6 of the June 24, 1993 Turner Declaration which contains the names of FBI agents. Their privacy interest is just as strong now as when the records were created and could cause embarrassment and/or humiliation if revealed. These document are not reasonably segregable. (June 24,

1993 Turner Aff. at ¶ 7.) Document 9 also mentions the name of a third party whose name, if disclosed, could lead to harassment for associating with law enforcement investigation. (June 24, 1993 Turner Aff. at ¶ 10.)

f. Documents A, B, and C (first pages FBI 204 Reports) are nonidentical copies of Documents 4, 5 and 6 listed above in category d and as described in paragraph 6 of the June 24, 1993 Turner Declaration. Although they are copies of the same respective documents, they contain additional information in the Synopsis paragraph of the documents. Since the Synopsis paragraph is not contained in Documents A through C, only exemption (b)(7)(C) has been asserted to protect the names of FBI agents. (June 24, 1993 Turner Aff. at ¶ 7.)

g. The name of any FBI agents contained in Document 1 as described in paragraph 6 of the June 24, 1993 Turner Declaration as a one-page report from the FBI to the Attorney General.

As explained more fully above and in the March Opinion, to date, plaintiff has not asserted a legitimate "public interest" against which to weigh the private individual's interests at stake. Plaintiff

repeatedly makes conclusory allegations of the government's misconduct that are unsubstantiated by the record. Until plaintiff can offer specifics, I cannot conclude that any public interest will be served by disclosure of these documents.

On March 9, 1993, the EOUSA referred 13 documents consisting of 16 pages of information from the files of the United States Attorney to the FBI for review and direct response to plaintiff. (June 24, 1993 Turner Decl. at ¶ 6.) These documents were created in the FBI Newark Field Office pursuant to the criminal investigation involving plaintiff as the main subject of the cases. These investigations were based upon information that plaintiff was committing or about to commit violations of the Interference of Commerce Through Threats of Violence Act (Hobbs Act), 18 U.S.C. §1951. One document was completely withheld from plaintiff because it does not mention or refer to plaintiff. I decline to perform an *in camera* review of that document as plaintiff requests. (*See* Pl. July 4, 1993 Ltr. Br. at p. 4) That the government has submitted a sworn statement affirming that the document does not relate to plaintiff is sufficient.

Plaintiff argues that since the F67 to F71 documents are dated from 1970 to 1972, the government must make a showing that the informants are still alive. (Pl. July 4, 1993 Ltr. Br. at p. 2; *see* June, 1993 Stewart Decl. at ¶ 7.) Even if plaintiff were correct and the informants are now

dead, the documents still could not be released to him because they are also protected by Exemption 7(A).

Exemption 7(D)

Exemption 7(D) exempts records compiled for law enforcement purposes that,

> (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by a confidential source, . . .

5 U.S.C. §552(b)(7)(D). In *United States Dep't of Justice v. Landano*, 124 LEd2d 84 (1993), the United States Supreme Court held that Exemption 7(D) does not exempt all FBI criminal investigative sources. Rather, the Court held that the agency asserting Exemption 7(D) must make an individualized showing of confidentiality with respect to each source. "[T]he question is not whether the requested *document* is of the type that the agency

usually treats as confidential, but whether the particular *source* spoke with an understanding that the communication would remain confidential." *Id.* at 94 (emphasis in original). The Court reasoned that the communications the FBI receives can range from the extremely sensitive to the routine and that reprisal may not be threatened or even likely in any given case. *Id.* at 97. The Court noted that considerations of "fairness" also counsels requiring the government to make a showing with respect to each source. *Id.* The Court explained that when the government asserts the Exemption, the FOIA requester, "who has no knowledge about the particular source or the information being withheld--very rarely will be in a position to offer persuasive evidence that the source in fact had no interest in confidentiality." *Id.*

According to the Court, "[a] source should be deemed confidential if the source furnished information with the understanding that the FBI would not divulge the communication except to the extent the Bureau thought necessary for law enforcement purposes." *Id.* at 95-96. However, the Supreme Court held under certain circumstances an inference can be drawn that communication was made in confidence. *Id.* at 98-100. For example, the Court noted that it is reasonable to infer that paid informants normally expect their cooperation with the FBI to be kept confidential. *Id.* at 98-99. The Court recommended that courts consider (1) the nature of the relationship the source has with the government--

does the source typically meet with the government only at certain locations and under certain conditions so as no to be noticed; (2) the character of the crime e.g. gang-related shooting of a police officer and (3) the source's relation to the crime. *Id.* at 99. The Court intended these examples or factors to be illustrative rather than exhaustive. Id. Indeed the Court noted that there may well be other generic circumstances in which an implied assurance of confidentiality fairly can be inferred. *Id.*

In the case at bar, I believe that documents 1, 4-8, 12 and 13 described in paragraph 6 of the June 24, 1993 Turner Declaration meet the standard established in *Landano* and are protected from disclosure by Exemption 7(D). Document 1 contains information provided by a permanent symbol numbered source. (June 24, 1993 Turner Decl. at ¶ 6.) Similarly, documents 4-8, 12 and 13 contain information from temporary symbol numbered sources and permanent symbol numbered sources. *(Id.)* These sources were given numbers to protect their identities and were expressly assured that their identities and the information they provided would be held in confidence by the FBI (Id. at ¶ 12.) To that end, the identities of these sources are known only to a few FBI employees and are made available only on a "need to know" basis. (*Id.*) The special precaution of issuing a number was taken because of the sensitive nature of the information provided and the probability of harm that could have befallen the sources if their identities were revealed. In all of

these documents, except document 1, the names of sources and any other words that might identify the sources were removed.

Plaintiff argues that the government should no be permitted to withhold these documents because there is no showing that the individual was given an express assurance of confidentiality. (Pl. July 4, 1993 Ltr. Br. at p. 4) Plaintiff suggests that an affidavit from the individual agent who personally gave the assurance should be provided. (*Id.*) Plaintiff's argument may be more persuasive in other cases, but not here. Plaintiff overlooks the fact that these sources were assigned numbers by the agency and their identities are held in such confidence that only a few FBI employees know who they are. Moreover, as stated by the Supreme Court in *Landano* one must be mindful of the underlying crime, which in this case involves organized crime activities such as murder, racketeering, loansharking *etc.*

Exemption 7(F)

Exemption 7(F) protects from disclosure information compiled for law enforcement purposes that "could reasonably be expected to endanger the life or physical safety of any individual . . ." 5 U.S.C. §552(b)(7)(F). As a result, the following documents are protected by Exemption 7(F):

a. The entire Relocated Witness Memorandum as provided in paragraph eight of the June 24, 1993 Wright Affidavit.

b. Documents described in categories a, b, c under Exemption 7(A) above.

Exemption 5

Exemption 5 allows the withholding of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. §552(b)(5). Exemption 5 has been interpreted as preserving privileges such as the attorney-client privilege, the attorney work-product privilege and the deliberative process privilege, also referred to as the executive privilege. *Schell v. U.S. Dep't of Health & Human Servs.*, 843 F.2d 933, 939 (6th Cir. 1988).

The government seeks nondisclosure of four draft affidavits prepared by Justice Department attorneys in anticipation of or during litigation. (*See* June 25, 1993 Stewart Decl. at ¶¶ 9-10.) "Draft documents, by their very nature, are typically predecisional and deliberative." *Exxon Corp. v. Department of Energy*, 585 F.Supp. 690, 698 (D.C.C. 1983) (citing *Pennzoil v. Department of Energy*, 4 Energy Mgt. (CCH) ¶26, 340, at 28, 606-07 (D. Del. 1981; *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir.

1980). The government has described these documents as follows:

1. A July 1991 draft prepared for support of an application for a Title III order authorizing interception of oral communications of organized crime figures--most of whom are still at large and are the subject of various on-going investigations. The draft contains mental impressions, evaluations and analysis of the bases of the application. (*Id.* at ¶ 9(a).)

2. A very rough draft, from approximately 1988, of portions of an affidavit for a search warrant application in U.S. v. Manna, Cr. 88-239. (*Id.* at ¶ 9(b).)

3. Several sections of a 1981 draft of an affidavit to be used in support of an application for a Title III order authorizing interception of oral communications relating to the criminal operations of another faction of the Genovese LCN Family. There are also handwritten notes on the first page indicating that the affidavit was a first draft and contains some mistakes. (*Id.* at ¶ 9(c).)

4. An October 1981 draft affidavit of a Strike Force attorney, together with a one-page draft Notice, to be used in support of a petition for an order designating certain defendants are Dangerous Special Offenders.

Pursuant to 18 U.S.C. §3575(b). (Id. at ¶ 9(b).) These documents are protected by the work product privilege as well as the governmental deliberative process privilege because they were internal governmental documents prepared in anticipation of or during litigation.

The three Case Initiation Reports ("CIRs") and their drafts as described in the June 25, Robert C. Stewart Declaration in paragraphs 11-12 and 14 are similar to the CIRs described in the December 18, 1992 Stewart Declaration in paragraphs 27-30 which I held in March were protected from disclosure by the deliberative privilege, attorney-client privilege and work-product privilege. *See Manna*, 815 F. Supp at 816. As explained in my previous Opinion, a CIR describes, among other things, the subject of the proposed investigative action, the charges contemplated, a summary of known facts, the organized crime connection of the suspects, the basis establishing that connection and the prosecutors' objective. CIRs are prepared by Strike Force attorneys in order to receive proper authorization to proceed with the recommended investigative action. I see no reason to diverge from my holding in March;

therefore, the defendants' motion with regard to the three CIRs documents is granted.

Similarly, defendants move for summary judgment for protection of additional "dailys" which are internal reports prepared by field attorneys to the Organized Crime and Racketeering Section in Washington. In March, I held that these types of documents are protected by the deliberative process and the work-product doctrine because they report significant events concerning the court of each prosecution *i.e.* relevant informant information. Therefore t he defendants' motion with regard to the six "dailys" as described in paragraphs 13 and 14 of Robert C. Stewart's June 25, 1993 Declaration is granted. Lastly, the handwritten report described in paragraph 15 in the June 25, 1993 1992 Stewart Declaration is protected by the work-product privilege and the governmental deliberative process privilege. It contains excerpts of Title III interceptions and analysis thereof. The report was written in preparation for the *Manna* criminal prosecution. The report is pre-decisional in character in that it marshals and analyzes evidence against the particular associate.

In his reply brief and in a letter to the court dated June 15, 1993 plaintiff reargues that he should be provided with copies of memoranda that may have been released to his counsel during his criminal case, *United Stated v. Manna*, Cr. 88-239 (D.N.J. Oct. 12, 1989). I have already adequately addressed

this argument in the March decision holding that disclosure of such information during the course of a criminal proceeding does not constitute a waiver of a FOIA Exemption. *Manna,* 815 F.Supp. at 813. I refer plaintiff back to that Opinion for the supporting case law.

Before closing, I feel it is necessary to reiterate the factual circumstances surrounding this case that heavily weigh against granting plaintiff's document request. First, plaintiff held the number three position of consigliere in the Genovese Crime Family the existence of which was proven *in United States v. Tierri,* Cr. No. 80-381 (S.D.N.Y.). The Genovese Crime Family is known to use violence, intimidation and obstruction to further its organized criminal activities. Second, plaintiff has been convicted of several serious crimes which included three separate murder predicates relating to the affairs of the Genovese LCN Family.[4] Despite the fact that plaintiff was sixty years old at the time of sentencing, Judge Barry sentenced plaintiff to a total

[4] In a previous Letter Opinion dated April 21, 1993, I assured plaintiff that my decision not to disclose the documents rested on the crimes plaintiff actually had been convicted of and not just unproven allegations. On page of four (4) of that Letter Opinion, I misstated that my decision no to release the documents was not based on his alleged participation in Irwin Schiff's murder. Since plaintiff was convicted of conspiracy for the Irwin Schiff murder in *Manna,* Cr. 88-239 (*see* Oct. 2, 1992 Robert Sewart Decl. at ¶ 30) my decision will be further based on plaintiff's participation in that murder.

of eighty (80) years in prison. Therefore, little weight can be afforded to plaintiff's claim that he is of no threat to anyone because of his prison confinement. Plaintiff's incarceration does not sever his lines of communication with the outside world. Third, plaintiff has never renounced his ties or affiliation with the Genovese Crime Family. Fourth, the government continues to investigate and prosecute Mafia related crimes and heavily relies on studying historical materials in connection with electronic surveillance evidence. The criminal acts which were committed during plaintiff's tenure as consigliere in the Genovese Crime Family remain under active investigation with the expectation that some of these will ripen into RICO prosecutions of equal or greater significant than the original *Manna* case.

For these reasons, defendants' motion for summary judgment is granted and plaintiff's cross-motion for summary judgment is denied. This ruling resolves all the remaining issues in the case and the order implementing it will be a final judgment.

Very truly yours,

s/ Dickinson R. Debevoise
Dickinson R. Debevoise
U.S.D.J.

Appendix E - Order and Judgment of the United States District Court for the District of New Jersey, Filed August 25, 1993 [Pages 115a - 116a]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Louis A. Manna,	:
Plaintiff,	:
v.	:
United State Department of Justice, et al.	:
Defendants	:

This matter having been opened to the Court on defendants', the United States Department of Justice and the United States Attorney for the District of New Jersey, motion for summary judgment pursuant to Fed. R. Civ. P. 56 and on plaintiff's, Louis A. Manna, cross-motion for summary judgment and the Court, having considered the submissions pursuant to General Rule 78; in accordance with a letter opinion of even date; and for good cause shown;

IT IS, this 25th day of August, 1993; ORDERED that:

Appendix B
[Order and Judgment of the USDC for the District of NJ]

1. Defendants' motion for summary judgment is granted in its entirety; and

2. Plaintiff's cross-motion for summary judgment is denied. This Order constitutes the final judgment in this case.

s/ Dickinson R. Debevoise

Dickinson R. Debevoise, U.S.D.J.